TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 146.

ANNIE M. UPSHUR AND JAMES A. UPSHUR, PLAINTIFFS IN ERROR,

vs.

MARY E. BRISCOE, WIDOW; MRS. BETTY SCOTT, AND G. CARNEAL GOLDMAN, HER HUSBAND; MRS. ELIZABETH ANDREWS AND THOMAS P. CLINTON, HER HUSBAND; AND MRS. FRANCES ANDREWS AND DUNCAN CHAMBERLAIN, HER HUSBAND.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

FILED OCTOBER 5, 1887.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

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1 *Petition.*

To the honorable the judge of the ninth district court for the parish of Tensas, State of Louisiana:

Mrs. Annie M. Upshur, a widow and *feme sole*, and James A. Upshur, both residing in the city of Washington and District of Columbia and citizens of the said District of Columbia, bring this their petition (bill) against Mrs. Mary E. Castleman, widow of, and Mrs. Elizabeth Andrews and Thomas P. Clinton, her husband; Mrs. Frances Andrews and Duncan Chamberlain, her husband; Mrs. Betty Scott and G. Carneal Goldman, her husband, heirs-at-law and legal representatives of, the late William J. Briscoe, all residents of the parish of Tensas and State of Louisiana and citizens of the said State of Louisiana.

And thereupon your oratrix and orator complain and say that on the 25th day of January, A. D. 1857, and within your said parish of Tensas James Andrews, the father of your oratrix, who then resided and subsequently died in said parish, desiring to make a provision for her maintenance and support, constituted and appointed the said William J. Briscoe, of said parish, her true and lawful attorney for him or in his name to pay or cause to be paid to your oratrix the sum of $700, seven hundred dollars, annually, commencing with the date of said appointment and continuing during the natural life of your oratrix, and further constituted and appointed him, the said William J. Briscoe, his attorney-in-fact to have and receive the sum of $10,000, ten thousand dol-
2 lars, to be held by him for the benefit of your oratrix, the annual payment of $700, seven hundred dollars, to be considered as interest upon the said amount of $10,000, ten thousand dollars — to remain invested in the hands of the said William J. Briscoe, the interest to continue to be paid as heretofore, and in case of the death of your oratrix such children, legal issue of her body, to become possessed of the above amount of ten thousand dollars, $10,000, unconditionally, and in case of the death of the said James Andrews occurring before that of your oratrix the above amount of $10,000, ten thousand dollars to be placed unconditionally in her hands by the said William J. Briscoe, provided only she should have no legal issue.

That the said William J. Briscoe accepted the said mandate in all its parts and clauses and bound himself faithfully to carry the same into effect, and, to more effectually secure the faithful performance thereof, bound himself as security that said mandate and all its stipulations should be faithfully complied with and executed in all its parts and clauses.

And that your oratrix accepting the said constitution of mandate in all its parts and clauses, ratifying and accepting the appointment of the said William J. Briscoe as her trustee, and binding herself to confirm and abide by the said mandate in all its provisions.

3 All of which will more fully appear from a duly certified copy of the act, signed and executed in presence of G. W. Williams and E. D. Farrar, witnesses, and duly acknowledged and recorded February 18th, A. D. 1857, in the Book of Wills and Donations for the said Parish of Tensas, folios 87 and 88, annexed to and made a part of this bill for reference and greater certainty and marked Exhibit A.

The plaintiffs further say that the said William J. Briscoe received from the father of oratrix the said sum of $10,000, ten thousand dollars, and paid to oratrix and continued to pay the sum of $700, seven hundred dollars, annually until about January, A. D. 1861, when the interruption of the communication between the States and the confusion and losses and disasters which attended the war preventing oratrix from demanding and the said William J. Briscoe from paying either any part of the interest or principal of the said sum entrusted to him.

The plaintiffs say that on or about February 26th, A. D. 1866, the said William J. Briscoe, to secure the payment of the sum of $50,000, fifty thousand dollars, of borrowed money, evidenced by his five several promissory notes for the sum of $10,000, ten thousand dollars, each, mortgaged and hypothecated unto Given, Watts and Co., of the city of New Orleans, all the property owned by him, consisting of

4 that certain tract of land or cotton plantation lying, being, and situate in the said parish of Tensas and State of Louisiana, known as the Mound plantation, and composed of the south half of section twelve, the whole of section thirteen, the whole of section twenty-four, the northeast quarter of section twenty-three, the east half of the northwest quarter, the northeast quarter, and the southwest quarter of section twenty-five, in township eleven, range eleven east, and sections thirty-nine and forty-five and the south half of section forty-one and the west half of the northwest quarter of section thirty-eight, in township eleven, range twelve east, of the land district north of Red River, and containing in the aggregate four thousand three hundred and fifty-seven acres, with and together with all the growing crops, buildings, household furniture, machinery, corn, stock, fodder, hay, and all other appurtenances, as will more fully appear from a duly certified copy of the act, hereto annexed for reference and greater certainty of description and marked Exhibit B. The plaintiffs together say that on or about November 29th, 1866, A. D., the said William J. Briscoe intermarried with the defendant, Mrs. Mary E. Castleman.

That on or about January 14th, 1868, Mrs. Mildred Gregory, as holder of three of the notes secured by the mortgage in favor of Given, Watts & Co., instituted suit thereon against the said William J. Briscoe, and on the 7th March, A. D. 1868, caused the property

5 hereinabove described, together with all the crops thereon mules, horses, *mules*, implements, etc., attached thereto and, forming part thereof, to be adjudicated to her for the sum of $20,000, twenty thousand dollars, as will more fully appear from a duly certified copy of the sheriff's deed, hereto annexed for reference and greater certainty of description and marked Exhibit C.

The plaintiffs further say that on April 1st, A. D. 1868, the said William J. Briscoe was adjudicated as bankrupt, with assets of the value of —— and debts to the amount of ——, and was duly discharged December 19th, A. D. 1868, as will more fully appear from the duly certified copies of the proceedings, hereto annexed for reference and marked Exhibit D.

The plaintiffs further say that on November 13th, 1868, the defendant *and* Mrs. Mary E. Castleman instituted suit against her husband, the said William J. Briscoe, for a separation of property, and that a judgment was rendered on the same day decreeing her to be separate in property from her said husband and dissolving the community of acquests and gains existing between them, as will more fully appear from the duly certified copies of the proceedings, hereto annexed for reference and marked Exhibit E.

The plaintiffs further say that on December 12th, A. D. 1868, the said Mrs. Mildred Gregory, for the price and consideration of $4,517.82, four thousand five hundred and seventeen $\frac{82}{100}$ dol-
6 lars, in cash and of $25,000, twenty-five thousand dollars, in notes, sold and conveyed to the defendant Mrs. Mary E. Castleman the Mound plantation, together with all the growing crops, stock, material, and other property acquired by her at the sheriff's sale, as will more fully appear from a duly certified copy of the act of sale, hereto annexed for reference and greater certainty of description and marked Exhibit F.

The plaintiffs further say that the said William J. Briscoe died in the said parish of Tensas and State of Louisiana about September, 1880, intestate, leaving surviving spouse, the defendant Mrs. Mary E. Castleman, and heirs-at-law and legal representatives, the defendants Mrs Elizabeth Andrews, wife of Thomas P. Clinton; Mrs. Frances Andrews, wife of Duncan Chamberlain, and Mrs. Betty Scott, wife of G. Carneal Goldman, and no property other than that described herein.

That oratrix was married in the city of Baltimore in July, A. D. 1858, to John B. Upshur, and that there is now surviving one child, your orator, James A. Upshur, sole issue of said marriage, born in the year 1859 and now twenty-two years of age.

That James Andrews, father of oratrix, died in your said parish of Tensas and State of Louisiana about January, 1860, and that by the terms and stipulations of the constitution of mandate, your ora-
trix having then one child, issue of her marriage, the said sum
7 of $10,000, ten thousand dollars, was to remain invested in the hands of the said William J. Briscoe, the interest to continue to be paid as heretofore mentioned to oratrix, but that notwithstanding she has never received from the said William J. Briscoe any part of the principal nor any part of the stipulated interest since about April, 1867, and that there is now justly and lawfully due to the plaintiffs, to be paid from the property and effects of the said William J. Briscoe, wherever found, the said sum of $10,000, ten thousand dollars, with arrears of interest at the rate of $700, seven hundred dollars, per year since January 1st, A. D. 1861, less the sum of about $700, seven hundred dollars, paid about April,

1867, with legal interest on the stipulated annual payments of $700, seven hundred dollars, from the first January of each year from the year 1862, inclusive.

Now your, oratrix and orator, have very recently been informed, and being informed believe, and believing aver, that the sale and conveyance of the property described in the act made by Mrs. Mildred Gregory to the defendant Mrs. Mary E. Castelman, passed before Richard Cuvillier, a notary public in the parish of Orleans, on December 12th, 1868, and of which a certified copy is hereto annexed, marked Exhibit F, was a fraudulent simulation, contrived and intended by the said William J. Briscoe to defraud oratrix and orator and to defeat the execution of the trust
8 confided to him, and that the said Mary E. Castleman, defendant, received the title of the property therein described for the use of the said William J. Briscoe, who paid the price or consideration expressed therefor and continued in possession of the said property.

The plaintiffs aver that the said William J. Briscoe, at the time when he accepted said mandate and up to the day of his death, was a person of large property, of unrivaled skill in his vocation of planter, and of almost unlimited credit, and at the close of the late war, in despite of the losses resulting from the emancipation of his slaves, he was still possessed of a valuable property and in the full maturity of his powers.

That in the year 1866 he intermarried with the defendant Mrs. Mary E. Castleman, who was possessed of no property whatsoever, either dotal or paraphernal.

That in the year 1868, with a view to obtain a release from his debts and obligations contracted by him, he procured Mrs. Mildred Gregory, a preferred creditor, to provoke the seizure and sale of all his property and to accept the sale and adjudication thereof, and, having thus secured himself from the pursuit of his creditors, made a surrender in bankruptcy, was adjudicated a bankrupt, and was discharged.

That, being still bound to the plaintiffs and contriving and
9 intending to defraud them and to prevent the enforcement of the trust confided to him, he procured the defendant Mrs. Mary E. Castleman to sue for and obtain a judgment of separation dissolving the community of acquests and gains between them, and the said Mrs. Mildred Gregory to sell and convey the entire property to her, the said Mrs. Mary E. Castleman, for the price and consideration of $4,517.82, four thousand five hundred and seventeen $\frac{82}{100}$ dollars, in cash and the sum of $25,000, twenty-five thousand dollars, in notes.

That the pretended vendee, Mrs. Mary E. Castelman, possessed neither *separate* nor industry, nor experience, nor skill, nor judgment, nor credit, nor responsibility, nor anything whatsoever to qualify her for the control of a large and valuable property, and that, to the contrary, the said William J. Briscoe was a person of large and varied experience, of ripe judgment, of unrivaled skill in his vocation, and of almost unlimited credit, and retained

throughout all the proceedings and up to the day of his death the exclusive management and control and direction of the large and valuable property and every detail of the business relating thereto and paid himself from the proceeds of the crops grown by him on the plantation in the year 1868 the said sum of $4,517.82, four thousand five hundred and seventeen $\frac{82}{100}$ dollars, to the vendor, Mrs. Mildred Gregory, as the portion of the purchase price paid in cash.

10 The plaintiffs show that oratrix and her said father had unlimited confidence in the friendship, integrity, financial ability, and discretion of the said William J. Briscoe, and that responding to relatrix's demand from time to time made he never disavowed or disclaimed the trust confided to him, but paid the annual interest stipulated until about January, 1861, and again paid said interest from about January, 1866, to about April, 1867, when, as your oratrix was induced to believe, his losses and the disorder and embarrassment of his affairs prevented him from making further payments and forced him into involuntary bankruptcy, and that your oratrix, in consideration of the relation of trust and confidence which had existed between the said William J. Briscoe and her said father and herself, forbore to distress and harass him, indulging the hope and confidence that he would ultimately recover and continue to discharge his trust, and that in or about the year 1872 the said William J. Briscoe offered to pay to oratrix the sum of $200, two hundred dollars, per year annually for several years, and so soon as he was able to pay the sum of $2,500, two thousand five hundred dollars, in final settlement, but that your relatrix declined said offer, preferring, although in very straitened circumstances, to await the time when the said William J. Briscoe would again be in a condition to make the annual payments and to have the intention of her deceased father carried into effect.

11 The plaintiffs show that they have very recently, for the first time, been informed that the said William J. Briscoe procured the sale and conveyance of his property to the defendant Mrs. Mary E. Castleman with deliberate intent to defraud them and to prevent the enforcement of the trust confided to him, and that while they have forborne to press their demands and have endured want and privation because of the relation of trust and confidence between them he, the said William J. Briscoe, has deliberately contrived to deceive and defraud them of the provision made for their maintenance and support.

All which actings, doings, and pretensions of the said William J. Briscoe and of the said defendants are contrary to equity and good conscience and tend to the manifest wrong, injury, and oppression of the plaintiffs in the premises.

In tender consideration whereof, and forasmuch as the plaintiffs are remediless in the premises at and by the strict rules of the law and are relievable only in a court of equity, where matters of this nature are properly cognizable and relievable—

To the end, therefore, that the said defendants may, if they can, show why the plaintiffs should not have the relief hereby prayed

for, and may, upon their respective and several corporal oaths and according to the best and utmost of their respective
12 knowledge and remembrance, information and belief, full, true, and perfect answer make;

And that an account may be taken by and under the direction and decree of this honorable court, and that the defendants may be decreed to pay to your oratrix & orator the said sum of $10,000, ten thousand dollars, with seven per cent. per annum interest from January 1st, A. D. 1861, less the sum of $700, seven hundred dollars, paid about April 1st, A. D. 1867, with five per cent per annum interest on each annual payment of $700, seven hundred dollars, from the first day of January of each year from the year 1862, inclusive, and that in case it may seem necessary to this honorable court to carry into effect the intention of the donor and to direct a specific performance of the terms and stipulations of the mandate it may be referred to one of the masters of this honorable court to appoint another person to be the trustee under the said act in the place and stead of William J. Briscoe;

And that the sale and conveyance of the property described herein made to the defendant Mrs. Mary E. Castleman by the said Mrs. Mildred Gregory by act passed December 12th, A. D. 1868, before P. Chas. Cuvillier, notary public, be declared simulated and fraudulent, and that the said property be declared to be the property of the estate of the said William J. Briscoe, dec'd, and subject
13 to the payment of the debts, charges, and obligations of the said deceased;

And that the plaintiffs may have such further and other relief in the premises as the nature of the circumstances of the case may require and to your honor shall seem meet—

May it please your honor to grant unto your plaintiffs a writ of subpœna citation, to be directed to the said Mary E. Castleman and the said Mrs. Elizabeth Andrews and Thomas P. Clinton, her husband, and the said Mrs. Frances Andrews and Duncan Chamberlain, her husband, and the said Mrs. Betty Scott and G. Carneal Goldman, her husband, thereby commanding them and each of them, at a certain time and under a certain penalty therein to be limited, personally to appear before this honorable court and then and there full, true, and direct answers to make to all and singular the premises, and, further, to stand to, perform, and abide any further order, direction, and decree therein as to this honorable court shall seem meet.

And your oratrix and orator will ever pray as in duty bound.

HALSEY & YOUNG,
Att'ys & Solicitors.

Filed August 1st, 1881.

JAS. S. MATTHEWS, *Clerk.*

14 EXHIBIT A.

James Andrews
to
Annie M. Andrews. } Donation.

STATE OF LOUISIANA,
Parish of Tensas.

Know all men by these presents that I, James Andrews, of said parish and State, do nominate, constitute, and appoint William J. Briscoe, also of said parish and State, my true and lawful attorney for me and in my name to pay or cause to be paid to Annie M. Andrews the sum of seven hundred dollars ($700) annually, said amount to be paid at the counting-house of some commission merchant or at some banking-house in the city of New Orleans in equal quarterly instalments of one hundred and seventy dollars each, said commission or banking house to be named and specified before the day of payment *to* the said W. J. Briscoe to the said Annie M. Andrews. The said payments are to be made commencing with the date of this instrument and continuing during the natural life of the said Annie M. Andrews, subject to the conditions and restrictions hereinafter enumerated, viz: The payments are to be regularly made as above set forth according to the discretion of the said William J. Briscoe of the general good conduct of the said Annie M. Andrews, which conduct must in all respects comport with the character and bearing of a discreet, prudent female

15 The said William J. Briscoe, being here present, accepts this appointment and trust and binds himself to carry out the provisions of the same according to its true intent and meaning; and I do further constitute and appoint the said William J. Briscoe my attorney-in-fact to have and receive the sum of ten thousand dollars ($10,000), to be held by him for the benefit of the said Annie M. Andrews, subject to the conditions hereinafter enumerated, viz: It is understood that the annual payment of seven hundred dollars as above secured shall be considered as interest upon said amount of ten thousand dollars; and, first, it is provided that in case the said Annie M. Andrews shall hereafter marry and leave issue this amount of ten thousand dollars shall remain invested as heretofore in the hands of said William J. Briscoe, and the interest shall continue to be paid as heretofore mentioned, and in case of the death of the said Annie M. Andrews such children, legal issue of her, shall become possessed of the above amount of ten thousand dollars unconditionally in full possession, to be paid by the said William J. Briscoe.

Second. It is provided that in case of my death occurring before that of the said Annie the above amount of ten thousand dollars shall be placed unconditionally in her hands by the said William J. Briscoe, provided only she shall have no legal issue. In case,

however, she shall at the time of my death have any child
16 or children, legal issue of her body, that the provisions heretofore enumerated shall be strictly adhered to;

And, third. It is provided that in case of the death of the said Annie M. Andrews without legal issue of her body surviving, then the above sum of ten thousand dollars shall revert to me, my heirs or assigns.

Thus done and signed, at St. Joseph, in said parish and State, this 25th day of January, A. D. 1857, in presence of Geo. W. Williams and Edgar D. Farrar, competent witnesses.

JAMES ANDREWS.

G. W. WILLIAMS.
E. D. FARRAR.

And now to these presents also comes William J. Briscoe, who accept this mandate in all its clauses and binds himself faithfully to carry the same into effect, and the more effectually to secure the faithful performance of the same he also binds himself as surety for the said James Andrews that the within mandate and all the stipulations therein contained shall be well and faithfully executed, and that the same shall be complied with in all its clauses.

Thus done and signed, at St. Joseph, on the 25th of January, A. D. 1857, in presence of G. W. Williams and Edgar D. Farrar.

W. J. BRISCOE.

Witnesses:
G. W. WILLIAMS.
E. D. FARRAR.

17 And at the same time and place also came the said Annie M. Andrews, who hereby declares that she accepts the above in all its parts and clauses, ratifying and accepting the said appointment of the said William J. Briscoe as her trustee and binding herself to confirm and abide by the above mandate in all its provisions.

Thus done and signed, at St. Joseph, on the 26th of January, A. D. 1857, in presence of Geo. W. Williams and Edgar D. Farrar

ANNIE M. ANDREWS.

Witnesses:
G. W. WILLIAMS.
E. D. FARRAR.

Recorded on the 18th day of February, A. D. 1857.

G. W. MONTGOMERY, *Recorder.*

A true copy of the original act as the same appears of record in my office in Book of Wills and Donations, at folios 87 and 88.

[SEAL.] HUGH TULLIS,
D'y Cl'k and ex Officio Deputy Recorder.

Filed August 10, '81.

H. TULLIS, *D'y Clerk.*

Exceptions.

Mrs. A. M. UPSHUR *et al.*
vs.
WIDOW AND HEIRS OF BRISCOE. } 9th Dist. Court, Tensas Parish.

18 Mrs. Mary E. Briscoe, one of the defendants in the above-styled suit, now appears, by her undersigned counsel, and, without in any manner answering to the merits, but reserving the right to answer over in case this exception is not sustained, excepts that plaintiffs' petition discloses no cause of action as against this defendant on account of the substantive allegations therein and the documentary evidence made part thereof.

For further cause of exception defendant avers that plaintiffs' right of action, if it ever existed, is barred by the discharge of Wm. J. Briscoe in bankruptcy, as alleged in plaintiffs' petition, which discharge is specially pleaded.

Defendant pleads the prescription of one, three, and ten years in bar of plaintiffs' right of action, if such right ever existed, which is denied.

Wherefore defendant prays that plaintiffs' demand be rejected and she be hence dismissed with her costs.

E. D. WHITE,
J. W. MONTGOMERY,
Of Counsel.

Filed July 8, '82.

R. H. SNYDER, JR., *Dep. Clerk.*

Answer of Mrs. Briscoe.

Mrs. A. M. UPSHUR *et al.*
vs.
Mrs. MARY E. BRISCOE *et al.* } 9th Dist. Court, Parish of Tensas.

19 Mrs. Mary E. Briscoe, widow of the late W. J. Briscoe, deceased, made one of the defendants in the above cause, now appears, by her undersigned counsel, and, without in any manner waiving the exceptions filed therein, but still urging and insisting upon the same, for answer to the demand of plaintiffs denies generally and specially all the allegations contained in plaintiffs' petition except such as may be herein admitted. Defendant specially denies that plaintiffs are creditors or have a valid claim against the estate or succession of said Briscoe, but avers that if said plaintiffs ever had a valid claim against said Briscoe, which is denied, the same has been fully discharged, and plaintiffs' right of action forever barred by the discharge of s id Briscoe in bankruptcy in April, 1868, as alleged in plaintiffs' petition, and will be shown upon the trial hereof. Defendant avers that the pretended donation, trust, or mandate described in plaintiffs' petition and upon which plaintiffs base their demand, if not discharged by the said bankruptcy, creates

no valid or legal obligation upon the succession of Briscoe, for the reason that said mandate, donation, or trust is a contract made in violation of a prohibitory law of the State of Louisiana; that even if it should be made to appear that said mandate, donation, or trust does create a valid and subsisting obligation upon the succession of the said W. J. Briscoe this defendant avers that neither she
20 nor her Mound plantation are in any manner bound or liable therefor, and for the reasons that defendant was separate in property from her said husband under a decree legal and valid in form and substance regularly obtained contradictorily with the said Briscoe on the 13 day of November, 1868, in the honl. 13th district court for Tensas parish, State of Louisiana.

That said judgment was authorized by the embarrassed circumstances of said Briscoe and his indebtedness to this defendant, and was made necessary in order to secure and protect the defendant in the enjoyment of any future earnings or property she might thereafter acquire; that said judgment was executed dissolving forever the community before existing between defendant and said Briscoe, and that all the proceedings leading to said judgment were regular and legal, as will fully appear by the record of said suit, styled Mrs. Mary E. Castleman *vs.* W. J. Briscoe, her husband, No. 2030 on the docket of said court, and to which reference is here made.

That subsequently and while defendant was so separate in property from her said husband, to wit, on the 12th day of December, A. D. 1868, the defendant acquired the said Mound plantation described in plaintiffs' petition by purchase in her own name and for her separate account from one Mrs. Mildred Gregory, as fully appears by the authentic act of sale of said date, to which reference is here made.

That defendant negotiated said purchase in person and
21 executed the notes and mortgage for part of the purchase price with the authority of her said husband.

That immediately upon said purchase defendant went into possession of said plantation, and has had the sole and exclusive control and ministration of said plantation up to the present time.

That said purchase was real and made in good faith by the defendant for her own use and separate account; that said Briscoe has in no manner had the possession, control, or administration of said plantation since said purchase, but that same has been constantly administered by defendant for her own separate account.

That on the 28th day of January, 1878, defendant executed a mortgage upon said plantation in favor of A. F. Brown, as will fully appear by the authentic act of mortgage of said date, passed before Hugh Tullis, notary, on the 9th day of M'ch, A. D. 1876; that defendant made all contracts and drew all drafts in business connected with said plantation, except in instances where special power of attorney was given to agents; that at the time of said purchase and up to his death the said Briscoe was an invalid, unable to attend to the business of a large plantation; that he died on the — day of September, A. D. 1880, of softening of the brain; that defendant is a woman of unusual vigor, energy, and business ca-

22 pacity, and by her skill and by her close personal attention to said plantation her prudence and economy made the business of said plantation profitable, from which she was enabled to pay and has paid the mortgage notes.

That defendant's vendor, the said Mrs. Mildred Gregory, acquired the said Mound plantation by purchase at sheriff's sale in said parish and State on the 7th day of March, A. D. 1868, in the suit of said Mrs. Mildred Gregory *vs.* W. J. Briscoe, No. 1945 on the docket of said court, being a purchaser of certain mortgage notes held by said Mrs. Gregory and owned by her, as will fully appear by the record of said suit and the authentic act of said sale, of date——.

That said sale and purchase by said Mrs. Mildred Gregory was real and the title she thereby acquired valid and legal in every respect. Defendant specially denies that said plantation belongs in any manner to the succession of the said W. J. Briscoe, deceased, or is in any way bound for the debts of said estate, but avers that said plantation is her own separate property, as above set forth.

Wherefore defendant, urging and relying upon the exceptions heretofore filed herein, prays that plaintiffs' demand may be rejected and she be hence dismissed with all costs.

E. D. WHITE,
J. W. MONTGOMERY,
STEELE & GARRETT,
Att'ys for Def't.

Filed Oct. 26, '82.

JAS. L. MATTHEWS, *Clerk.*

23 *Answer of Betty Scott and Husband.*

Mrs. A. M. Upshur *et al.*	}	Ninth District Court,
vs.		Parish of Tensas.
Widow & Heirs of Briscoe.	}	No. 3054.

Now, by their counsel, come Betty Scott and her husband, G. Carneal Goldman, made defendants in this cause, and, for answer to plaintiffs' petition, deny the allegations therein contained, except what may be hereinafter admitted.

They admit that Betty Scott is one of the legal heirs of Wm. J. Briscoe, dec'd, but aver that his succession has never been opened. They further say that they have instituted in this honorable court legal proceedings against Mary E. Castleman, widow of said Wm. J. Briscoe, dec'd, to compel her to open said succession and that your respondent, Betty Scott, be duly recognized as heir of said Briscoe with benefit of inventory, and the said suit is now pending.

This respondent admits the correctness of the allegations of the plaintiffs herein in reference to the illegal transfer of property of said Briscoe to his said wife, but deny that the plaintiffs are entitled to any judgment as prayed for.

Respondents further say that as to them this suit is premature, and that no judgment can be rendered against them.

24 Wherefore they pray that plaintiffs' demand be rejected with costs, and for general relief, &c.

JULIUS ARONI,
S. CHAS. YOUNG,
Att'ys for Betty Scott, Wife of Goldman, & Husband.

Filed Oct. 26, '82.

R. H. SNYDER, Jr., *D'y Clk.*

Amended Petition.

To the honorable, the judge of the ninth district court for the parish of Tensas:

Mrs. Annie M. Upshur and James A. Upshur, plaintiffs in that certain suit now pending on the docket of your honorable court entitled Mrs. Annie M. Upshur *et al. vs.* Widow & Heirs of Briscoe and numbered —, with respect pray to be allowed to amend their original petition by adding thereto the following allegations:

Your petitioners aver that the transaction between the dec'd, William J. Briscoe, and Mrs. Mildred Gregory and Mrs. Mary E. Briscoe by which the ownership of the Mound plantation was attempted to be transferred (or pretended to be transferred) from their debtor, the said William J. Briscoe, to his wife, the said Mrs. Mary E. Briscoe, if not a fraudulent simulation contrived and intended to defraud your petitioners and to defeat the enforcement of the trust confided to him, the said William J. Briscoe, and if real and intended to transfer the ownership and possession of the said property
25 to the said Mary E. Castleman, was absolutely null and void as a disguised and direct donation of his rights in the said property by the said William J. Briscoe, made with his consent and by the interposition of the said Mrs. Mildred Gregory to the said Mrs. Mary E. Castleman, his wife, and as such made in violation of a prohibitory law and absolutely null and void.

Your petitioners aver that said transaction, if real and not simulated and fraudulent, as they have denied and still deny, was absolutely null and void for the further reason that the pretended purchase price of the property undertaken to be paid by the said Mrs. Mary E. Castleman was in fact the debt of the said William J. Briscoe to the said Mrs. Mildred Gregory, or to the said Given, Watts & Co., or Given, Brown & Co., or H. F. Given & Co., or the holder or holders of the said note or notes undertaken and assumed to be paid by the said Mrs. Mary E. Castleman. Your petitioners further aver that if said transaction was not simulated and fraudulent and absolutely null and void, as they have averred and still aver, and if the said Mound plantation is not entirely the property of the succession of the said William J. Briscoe, dec'd, and subject to the exercise of their rights, at least one undivided half of said property belongs to the succession of the said William J. Briscoe, their dec'd
26 debtor, subject to a settlement of the community existing between him and his surviving wife.

Your petitioners show that the pretended judgment of separation between the said William J. Briscoe and his said wife was and is absolutely null and void; that the said Mrs. Mary E. Castleman had no property of any kind when she was married to the said William J. Briscoe; that she never inherited one thousand dollars from her father, as alleged in her petition in said suit, nor received the gift of a horse from the said Mrs. Mildred Gregory, as therein alleged; that said horse so pretended to be given was on the Mound plantation on the day of the sale and adjudication to Mrs. Mildred Gregory so pretended to be made, and, being a saddle horse and not appurtenant to the said plantation, was not covered by the mortgage and did not pass to the pretended purchaser, who acquired no ownership and could not make a donation thereof.

That even if said donation had been made, which is denied, the pretended judgment of separation is absolutely null, because Mrs. Mary E. Castleman brought nothing in marriage and had no separate avocation of any kind and no separate earnings to be endangered by the disorder of her husband's affairs; that in fact her said husband had made a surrender of his debts in bankruptcy and was about to be discharged, and was in fact shortly thereafter discharged and relieved of all his obligations except that to your petitioners.

27 That the answer of the said Briscoe was filed by the same attorney who instituted the executory proceedings against him on the same day on which the wife's petition was filed; that there was no citation and no evidence adduced; that judgment was rendered on the same day, and that the entire proceedings was a mere private agreement between husband and wife, prohibited by the laws of Louisiana.

Your petitioners show that soon after said voluntary separation and before the sheriff had made his return under the writ issued under said consent judgment, to wit, on the 12th day of December, 1868, the said Mrs. Mary E. Castleman pretends to have bought, in her own name, from the aforesaid Mrs. Mary P. Gregory the said Mound plantation for the sum of $29,217.82, of which she pretends to have paid in ready money the said sum of $4,517.82.

Your petitioners further show that, the judgment of separation being a nullity, the said Mrs. Mary E. Castleman could not acquire property in her own name; that she had no money and could not by her industry have made the money which she pretends to have paid.

That said William J. Briscoe, after the pretended sale of the Mound plantation to Mrs. Mildred Gregory, retained the possession and administration thereof, as he had done for many years previous thereto, without the slightest change whatever; that he used

28 his own means and the revenues of the plantation to reduce and almost liquidate the indebtedness evidenced originally by the notes and mortgage to Given, Watts & Co., and owned said plantation to the day of his death.

Wherefore, the premises considered, your petitioners pray for judgment as before, or that, if real, which they have denied and

still deny, said transaction be declared absolutely null and void as a disguised and indirect donation by the said William J. Briscoe to the said Mrs. Mary E. Castleman, wife, made in contravention of the laws of Louisiana, and said Mound plantation declared to be entirely the separate property of the said William J. Briscoe, dec'd, and subject to the payment of his debts.

Petitioners further pray that if it should not be held, as they have averred and still aver, that said transaction was simulated and fraudulent and absolutely null and property entirely the property of their dec'd debtor, it be decreed that the pretended judgment of separation between the said William J. Briscoe and his said wife was and is absolutely null and void and the said Mound plantation the property of the community existing between the said William J. Briscoe and his said wife and one undivided half of the property the property of the said W. J. Briscoe, dec'd, subject to a settlement of said community; pray as before for costs and general relief.

WADE R. YOUNG, *Of Counsel.*

Filed Nov. 21, '82.

R. H. SNYDER, JR., *D'y Clk.*

29 *Answer of Mrs. Briscoe to Am'd Pet'n.*

Mrs. A. M. UPSHUR
vs.
Mrs. M. E. BRISCOE *et al.* } Tensas Parish, 9th Dis't Court.

Mrs. M. E. Briscoe, — of defendants herein, again appears, by her undersigned counsel, and, for answer to the amended and supplemental petition of plaintiffs, denies generally all the allegations contained in their petition, and, adopting and reaffirming all the averments of the original answer filed herein, prays that the demand be rejected and that defendant be dismissed with all costs.

STEELE & GARRETT, *Att'ys.*

Filed Jan'ry 9, '83.

R. H. SNYDER, JR., *Dep. Clerk.*

Plea of Prescription.

MRS. A. M. UPSHUR *et al.*
vs.
WIDOW & HEIRS OF BRISCOE. }

Defendant, Mrs. Mary E. Briscoe, now appears again and pleads the prescription of five years in bar of plaintiffs' action, and prays to be hence dismissed.

WHITE & MONTGOMERY AND
STEELE & GARRETT, *Att'ys.*

Filed June 23d, 1882.

R. H. SNYDER, JR., *Dep. Clerk.*

30 *Answer of Betty Scott and Husband to Am'd Pet'n.*

Mrs. A. M. Upshur *et al.* *vs.* Widow and Heirs of Briscoe. } No. 3054. Ninth District Court, Parish of Tensas.

Now, by their counsel, come into court Betty Scott and her husband, C. Carneal Goldman, made defendants in this cause, and, for answer to the amended petition of plaintiffs filed herein, adopt all the allegations of the original answer, and pray—.

JULIUS ARONI,
S. CHAS. YOUNG,
Of Counsel.

Filed June 27, '83.

R. H. SNYDER, Jr., *Dep. Clk.*

Answer of Mrs. Clinton and Mrs. Chamberlain.

Annie M. Upshur *et al.* *vs.* Widow and Heirs of Briscoe. } Ninth District Court, State of Louisiana, Parish of Tensas.

Now into court appear, by their undersigned counsel, Mrs. Elizabeth Clinton, wife of Thomas P. Clinton, and Mrs. Frances Andrews Chamberlain, wife of D. C. Chamberlain, made defendants in the above-styled cause, both of said defendants being aided and authorized by their said husbands, and, for answer to plaintiffs' petition and amended petition, denies each and every allegation
31 therein contained, except such as are hereinafter admitted.

Defendants admit that they are nieces of William J. Briscoe, deceased, and that so far as respondents are informed that the said Wm. J. Briscoe died intestate, and that they, with their codefendant, Mrs. Bettie Goldman, are the legal heirs of the deceased; but these defendants further aver that the succession of the said Wm. J. Briscoe has never been administered upon, and that no inventory thereof has been made and no one has applied to open said succession; and respondents further aver that no property of said succession has ever come into their possession or under their control, and aver that they have done no acts, as heirs or otherwise, that would in any manner bind them, as heirs of the deceased, for the payment of any debts that may be due by his succession, and plaintiffs' demand is premature so far as these def'ts are concerned.

Defendants further reserve the right hereafter to reject or accept said succession of Wm. J. Briscoe, deceased, after the same has been regularly opened and an inventory of the property thereof has been made and a tableau of assets and debts has been made according to law. Defendants pray that the demand of plaintiffs be rejected at their costs, and for general relief.

THOMAS P. CLINTON,
Attorney for Above-Named Defendants.

Filed June 27, '83.

R. H. SNYDER, Jr., *D'y Clk.*

32 Extract from Minutes.

Minutes.

Mrs. A. M. Upshur *et al.*
vs.
Widow and Heirs of Briscoe.

November 15th, 1881.

Agreement of counsel filed.

June 29th, 1882.

Continued by consent.

July 3d, 1882.

On motion of pl'ffs' counsel the order for continuance on June 29th set aside.

Judgment by default taken against all the defendants.

July 8th, 1882.

Peremptory exception filed.

Case continued.

Return day of testimony of Mrs. Gregory extended to 3d Monday Nov., 1882.

Nov. 8th, 1882.

Fixed for Monday, 28th inst.

Nov. 20th, 1882.

Continued, on motion of counsel for pl'ffs.

33 June 28th, 1883.

Case taken up and trial proceeded with.

June 29th, 1883.

Case taken up, trial proceeded with, evidence closed.

June 30th, 1883.

Case taken up and trial concluded. Judgment for defendant, Mrs. Briscoe, rejecting plaintiff's demand, and judgment for pl'ff as against heirs of Briscoe. See decree.

In this case it was ordered, on motion of counsel for plaintiff, counsel for defendant being present and taking cognizance thereof, that a devolutive appeal be granted plaintiff from the judgment rendered herein, made returnable to the hon. supreme court of the State of Louisiana at its next session, to be holden at the city of New Orleans on the second Monday of February, 1884, upon plaintiff's giving bond, conditioned according to law, in the sum of $500.00.

(Minutes signed) WADE H. HOUGH,
Judge 9th District.

State of Louisiana,
Parish of Tensas, 9th District Court.

I hereby certify that the foregoing is a true and correct copy of the minutes of the 9th district court in and for Tensas parish,
34 La., in the cause wherein Mrs. A. M. Upshur *are* pl'ffs and

Widow and Heirs of Briscoe are defendants, and numbered 3054 on the docket of said court.

[SEAL.] Witness my hand and seal of office, at St. Joseph, La., January 30th, 1884.

(Signed) R. H. SNYDER, Jr.,
Deputy Cl'k of said Court.

Judgment.

ANNIE M. UPSHUR *et al.*
vs.
WIDOW AND HEIRS OF BRISCOE. } Dist. Court, Parish Tensas.

By reason of the law and the evidence being in favor of defendant, Mrs. Mary E. Briscoe, and against the plaintiffs, it is ordered, adjudged, and decreed that said Mrs. Briscoe do have judgment against pl'ffs; that plaintiffs' demand be rejected at their costs.

And by further reason of the law and the evidence being in favor of the plaintiffs and against the heirs of Briscoe mentioned in petition, it is ordered, adjudged, and decreed that pl'ffs do have and recover judgment against said heirs for the sum of seven hundred dollars annually from the 1st January, 1872, with five per cent. interest, as claimed, and with costs of this suit, and that the judgment as to these sums be restricted to the property and effects of
35 the succession of W. J. Briscoe, wherever found, reserving the right to the heirs of Briscoe to renounce or accept the succession, with the benefit of inventory hereafter.

It is further ordered, adjudged, and decreed that the demand of the pl'ffs for the sum of ten thousand dollars, set out in petition, be rejected as premature to heirs of Briscoe.

Read and signed in open court this 30th day of June, 1883.

WADE H. HOUGH,
Judge 9th District.

Filed June 30, 1883.

R. H. SNYDER, Jr., *D'y Cl'k.*

36 *Proceedings in Supreme Court of the State of Louisiana.*

Called and continued.

Extract from the Minutes of Tuesday, February 12th, 1884.

The court was duly opened.

Present: Their honors Edward Bermudez, chief justice, and Felix P. Poche, Robert B. Todd, Charles E. Fenner, Thomas B. Manning, associate justices.

Mrs. A. M. UPSHUR
vs.
WIDOW AND HEIRS OF BRISCOE. } No. 9103.

This case was called for trial, and on motion of Hiram R. Steele, Esq., of counsel for the defendants and appellees herein—

The court ordered said case to be continued and not again set down for trial until the lapse of three judicial days from the date of the filing of the transcript of appeal in this case.

37 *Answer to Appeal. Filed February 11th*, 1884.

ANNIE M. UPSHUR *et al.*
vs.
WIDOW AND HEIRS OF BRISCOE. } No. 9103. Supreme Court of Louisiana.

The heirs of Briscoe, against whom judgment has been rendered in the above-entitled cause, from which judgment the plaintiff has taken this appeal, now appear by their undersigned counsel, and in answer to said appeal they say that they have cause to complain of the judgment appealed from for the reason that as to them the entire case is premature and ought to have been dismissed, and for the further reason that plaintiff's demand is illegal against all defendants, and is based upon a claim prohibited under the laws of Louisiana, and if the same can have any legal existence it is prescribed. These appearers therefore plead the prescription of one, three, five, and ten years, and pray that the judgment herein rendered against them be reversed with costs in both courts and confirmed on the rest; and further they pray for general relief.

(Signed) JULIUS ARONI,
Attorney for Heirs of Briscoe.

38 *Admission of Counsel. Filed February 15th*, 1884.

UPSHUR
vs.
BRISCOE.

BETTY GOLDMAN
vs.
MRS. BRISCOE.

In these two cases it is admitted that the judgment of separation in favor of Mrs. Briscoe against her husband and the dissolution of the community was duly advertised according to law.

(Signed) WADE R. YOUNG, *Att'y.*
JALIUS ARONI,
Att'y for Heirs of Briscoe.

39 *Argued and Submitted.*

Extract from the Minutes of Friday, February 15th, 1884.

The court was duly opened.

Present: Their honors Edward Bermudez, chief justice, and Felix P. Poche, Robert B. Todd, Charles E. Fenner, Thomas B. Manning, associate justices.

Mrs. A. M. Upshur
vs.
Widow and Heirs of Briscoe. } No. 9103.

This case was called for trial, and having heard argument from Wade R. Young, Esq., of counsel for plaintiff and appellant, and from J. W. Montgomery, Hiram R. Steele, and Edward D. White, of counsel for the Widow Briscoe, defendant and appellee, and from Julius Aroni, Esq., of counsel for the heirs-at-law of Briscoe, defendants, also appellees herein—

The court took said case under advisement upon the briefs for parties in interest and the papers now on file.

40 *Final Decree.*

Extract from the Minutes of Monday, May 19th, 1884.

The court was duly opened pursuant to adjournment.

Present: Their honors Edward Bermudez, chief justice, and Felix P. Poche, Robert B. Todd, Charles E. Fenner, Thomas C. Manning, associate justices.

His honor Justice Manning pronounced the judgment and decree of the court in the following case:

Annie M. Upshur *et al.*
vs.
Mary E. Briscoe *et als.* } No. 9103.

Appeal from 9th judicial district court, Tensas parish.

It is ordered and decreed that the judgment of the lower court is reversed in these particulars: That instead of rejecting the plaintiffs' demand, the same is maintained, and the sale and conveyances by which Mildred Gregory received title to the Mound plantation and its appurtenances from the sheriff, and by which she afterwards conveyed title to Mary E. Briscoe are annulled, cancelled, and set aside, and the property thus conveyed is declared to belong to the succession of William J. Briscoe, and to be liable to the
41 plaintiffs herein for the satisfaction of this judgment; and it is further ordered and decreed that the plaintiffs have and recover of the succession of said Briscoe seven hundred dollars, with five per cent. interest thereon from January 1, 1872, and the same sum, with same interest from the first of January of each succeeding year until paid, and the further sum of ten thousand dollars and costs of this suit, and in other respects that the judgment be affirmed.

42 *Final Decree and Opinion.*

Supreme Court of the State of Louisiana.

CLERK'S OFFICE,
NEW ORLEANS, *May 19th*, 1884.

ANNIE M. UPSHUR *et al.*
vs.
MARY E. BRISCOE *et als.* } No. 9103.

Appeal from the ninth judicial district court for the parish of Tensas.

Mr. Justice Manning pronounced the opinion and decree of the court in the words and figures following, to wit:

The plaintiff Annie is the daughter of James Andrews and the widow of John B. Upshur. Her son and only child is coplaintiff and is of age.

The defendant Mary is the childless widow of William J. Briscoe, and her codefendants are his nieces and heirs-at-law—all married.

The action is based upon this paper-writing:

STATE OF LOUISIANA, }
Parish of Tensas. }

Know all men by these presents that I, James Andrews, of said parish and State, do nominate, constitute, and appoint William J. Briscoe, also of said parish and State, my true and lawful attorney, for me and in my name to pay or caused to be paid to Annie M. Andrews the sum of $700 annually; said amount to be paid at the counting-house of some commission merchant or at some
43 banking-house in the city of New Orleans, in equal quarterly instalments of $175 each, said commission or banking house to be named and specified before the day of payment to the said W. J. Briscoe and the said Annie M. Andrews, subject to the conditions and restrictions hereinafter enumerated, viz: The payments are to be regularly made as above set forth, according to the discretion of the said William J. Briscoe of the general good conduct of the said Annie M. Andrews, which conduct must in all respects comport with the character and bearing of a discreet, prudent female.

The said William J. Briscoe, being here present, accepts this appointment and trust and binds himself to carry out the provisions of the same according to its true intent and meaning; and I do further constitute and appoint the said William J. Briscoe my attorney-in-fact, to have and receive the sum of $10,000, to be held by him for the benefit of the said Annie M. Andrews, subject to the conditions hereinafter enumerated, viz:

It is understood that the annual payments of $700, as above secured, shall be considered as interest upon the said amount of $10,000; and, first, it is provided that in case the said Annie M.

Andrews shall hereafter marry and leave issue, this amount of $10,000 shall remain invested as heretofore in the hands of the said William J. Briscoe, and the interest shall continue to be paid as heretofore mentioned; and, in case of the death of the
44 said Annie M. Andrews, such children, legal issue of her, shall become possessed of the above amount of $10,000, unconditionally in full possession, to be paid by said William J. Briscoe; second, it is provided in case of my death occurring before that of the said Annie the above amount of $10,000 shall be placed unconditionally in her hands by the said William J. Briscoe, provided only she shall have no legal issue. In case, however, she shall at the time of my death have a child or children, legal issue of her body, then the provision heretofore enumerated shall be strictly adhered to; and, third, it is provided that in case at the death of the said Annie without legal issue of her body surviving, then the above sum of $10,000 shall revert to me, my heirs or assigns.

Thus done and signed at St. Joseph, in said parish and State, this 25th January, 1857, in presence of Geo. W. Williams and Edgar D. Farrar, competent witnesses.

JAMES ANDREWS.

G. W. WILLIAMS.
E. D. FARRAR.

And now to these presents also comes W. J. Briscoe, who accepts this mandate in all its clauses and finds himself to faithfully carry the same into effect; and, the more effectually to secure the faithful performance of the same, he also binds himself as surety for the said James Andrews that the within mandate and all the stipulations therein contained shall be well and faithfully exe-
45 cuted, and that the same shall be complied with in all its clauses.

Thus done and signed at St. Joseph on the 25th day of January, 1857, in the presence of G. W. Williams and Edgar D. Farrar.

W. J. BRISCOE.

Witnesses:
G. W. WILLIAMS.
E. D. FARRAR.

And at the same time and place also came the said Annie M. Andrews, who hereby declares that she accepts the above in all its parts and clauses, ratifying and accepting the appointment of the said William J. Briscoe as her trustee and binding herself to confirm and abide by the above mandate in all its provisions.

Thus done and signed at St. Joseph, on the 26th day of January, 1857, in the presence of George W. Williams and Edgar D. Farrar.

ANNIE M. ANDREWS.

Witnesses:
G. W. WILLIAMS.
E. D. FARRAR.

Recorded in Book of Wills and Donations.
Tansas parish, February 18, 1857.

The payment of $700 was annually made until the outbreak of the war between the States, the last regular payment in course having been made in January, 1861. One other was made after the close of the war, viz., in April, 1867; none since that date.

46 James Andrews died in 1860. Briscoe married the defendant Mary in 1866, was adjudicated a bankrupt, and was discharged in 1868, and died in 1880.

In 1857, when the above instrument was executed, Mr. Briscoe owned a large and valuable property, with its appurtenances, which he had successfully cultivated many years. He was rich or had the appearance of wealth. Neither Andrews nor any other person in Tensas could have reason to suppose that his affluence would soon disappear. Andrews, pondering how he could best make some provisions for his daughter, entrusted Briscoe with the money set apart for her, and died before the crash came.

In October, 1865, Briscoe mortgaged his plantation for $8,081.92, a compromise of a large ante-bellum debt, and in February, 1866, executed another mortgage for $50,000 to Given, Watts & Co., and in April following a third mortgage to C. Fellows for $58,450.16. His last mortgage was also for ante-bellum debts, but the Given mortgage was made to enable him to operate his plantation. He did cultivate it through 1866 and 1867, with the disastrous results that have made those years memorable.

The year 1868 opened gloomily. Given, Watts & Co. had made a surrender in bankruptcy, but prior thereto, as is asserted, they had transferred to Mrs. Mildred Gregory such of Briscoe's notes as had been consumed in his planting operations—three of them of ten thousand dollars each. Mrs. Gregory is the mother-in-law

47 of Given, and this transfer was made, as is charged, to pay her $4,000 that the firm owed her and $15,000 that the firm owed her daughter, Given's wife. Mrs. Gregory sued Briscoe on these notes in January, 1868, and foreclosed the mortgage and bought the property in March for $20,000. In April Briscoe went into bankruptcy with $2,000 of assets and $150,000 of debts. Briscoe and his wife staid on the place, he managing it as usual outwardly, but under a power of attorney from Mrs. Gregory and with no salary. The supplies were sent in Mrs. Gregory's name by Given, and the advances in like manner, and both were charged to the Mound plantation. In November came the next event that seems to follow those already narrated inevitably, and which one could predict with absolute certainty.

Briscoe's wife sued him for separation of property in November. She had no estate. She was a housekeeper when Briscoe married her. Mrs. Gregory had given her a horse, so she alleged, and her husband had sold it for $250 and spent the money, and so she had judgment for that sum and for separation—the same oft-enacted farce.

Then Mrs. Gregory sold Mrs. Briscoe the plantation and all there was thereon for $4,517.83 cash and $25,000 credit, extending through five years.

The sale was made one month after the judgment of Mrs. Briscoe

against her husband, when $250 was the sum total of her
48 earthly possessions, and the realization of that was dependant upon executing her judgment against a man who had six months before surrendered everything in bankruptcy and had since been working without pay.

The planting operations of that year had been successful. In December, when the sale was made, there was in Given's hands $9,102.48 net proceeds of the cultivation of that year, and which, of course, belonged to Mrs. Gregory, if she were the real owner of the property. This sum was transferred after the sale to the credit of Mrs. Briscoe. The sale included the growing crops and all things that had been adjudicated to Mrs. Gregory at the sheriff's sale.

The plantation was worked thereafter by Mrs. Briscoe as owner, her husband being her "manager" or agent. He died in 1880. This suit was instituted in 1881. Its object is to recover a judgment for the $10,000 and for each of the unpaid annual instalments, and to make it effective against the property all the acts and doings by and through which the title has been finally vested in Mrs. Briscoe are attacked as fraudulent simulations, and a decree is prayed decreeing the property to belong to Briscoe or his succession and liable for this debt.

The case has been handled with signal ability by both sides. The defenses are numerous; each in its turn hotly pressed, and
49 the result below was a judgment for the plaintiffs against the Briscoe heirs for $700 annually from January, 1872, dismissing the demand for $10,000, as in case of nonsuit, as prematurely made, and in favor of Mrs. Briscoe, rejecting the claim against her and, of course, recognizing the property as hers.

The preliminary question meeting us at the threshold is the character of the obligation assumed by Briscoe, for if it be not fiduciary, in the sense of the congressional statute, his discharge in bankruptcy released him from compulsory liability for it.

It would be difficult to find a fuller creation of a trust than in terms is there set out. Briscoe is to pay Ann Andrews a fixed sum annually, to produce which a large sum is put in his hands. The payment is not to be made unconditionally, but only if Ann's conduct is discreet and prudent, and of that Briscoe is to be the judge. His discretion alone controls him. If Ann shall marry and have issue the trust continues, and when she dies her issue shall be unconditional owners of the fund, and the trust terminates. If Andrews dies before his daughter she becomes unconditional owner, provided she have no issue. If she have issue, then the trust remains as before provided. If Ann dies before her father without issue surviving the money must be returned to Andrews or to his heirs.

The terms used in acts of Congress must be construed in
50 the sense given them in the common law. They are framed by common lawyers, have force and effect among and upon a people merely governed by the common law, and are interpreted by courts that expound and apply that system. Not a moment's doubt would be entertained by them that the word "fiduciary" in

the bankrupt act meant primarily and par excellence such obligation as was created by Andrews and accepted by Briscoe, and therefore the discharge of Briscoe in bankruptcy did not affect his liability for the obligation thus assumed by him. His own conception of the nature of the debt accords with this, since he entered it upon his schedule of debts as a "trust."

It is next urged that the settlement made by Andrews for the benefit of his daughter contains a substitution and *fide commissum*, and therefore cannot be enforced.

The fund of $10,000 was not given to the daughter, but only the usufruct thereof; nor was it given to Briscoe. It was placed in his hands with the conditions that he should pay over the fruits of it to the daughter if her good conduct merited it, and should pay the fund itself to her issue surviving at her death. It was a trust committed to his faithful care, the obligation of which he accepted and promised to conform to the conditions imposed and to carry out the purposes of the trustor, for we must not be frightened by names. The first court of this State said, as early as 1827, that the object of

51 the abolishment of substitutions and *fidei commissa* was well known to be to prevent property from being tied up for a length of time in the hands of individuals and placed out of the reach of commerce, and that the framers of our code certainly never contemplated to abolish naked trusts uncoupled with an interest which were to be executed immediately. Mathurin *vs.* Livaudais, 5 Mart. N. S., 302, and this was quoted and applied in Milne *vs.* Milne, 17 La., 57, and repeatedly since.

There is no property tied up and put out of commerce by the settlement of Andrews upon his daughter and her children of a sum of money. Grover *vs.* Nott, 13 A., 122; Suc. Michon, 30 A., 214; nor has it other indicia of substitution. It is not sufficient, says Marcade, in order to create a substitution that the donee shall be obliged to preserve the thing and to restore it. There must needs be an obligation to preserve it until his death. Thus substitution will not exist in a charge imposed upon a donee to preserve the thing given and deliver it to Paul at the end of ten years or when he shall become of age or at any time other than the death of the donee. * * * Whenever a liability is made with a charge to restore it at any other time than death it is an ordinary *fidei commissum*, but not such as the law reprobates. 3 Explication du Code Nap., par. 463; and he goes on to explain that even when the liability is made with a charge to preserve it until the death of the

52 party charged with it, it will not be obnoxious if the charge is to transmit it to a determinate person, and especially when that person is the heir, for that would not interfere with the legal order of succession. *Ibid.*, No. 464. Still further on he argues that it is not always a prohibited substitution when the charge is to return the property to the donor, for *c'est un veritable retour et non pas une substitution. Ibid.*, 694; and in the light of his argument it may very well be that the last clause of Andrews' instrument, the condition that he shall receive back from Briscoe this money if his daughter shall die without heirs, would not be reprobated; but it is

not necessary that we should make any ruling on that matter, since the event did not occur. That condition, if reprobated, may be excided, leaving all others and the donation subsisting. Marcade, No. 694.

In this and kindred questions the true rule of construction is not to give effect to refinements for the purpose of so bending the instrument as to bring it within the terms of a prohibition, but rather to give effect and potency to its meaning and intent, whether or not the language used is in strict conformity to our own nomenclature.

The object and intent of Andrews was one that should be encouraged, not reprobated, to provide for his daughter through varying circumstances. Had he by any sort of donation given her the usufruct and retained the naked property himself, or given it her for a term only or for life, the law would not have nullified
53 it. He has merely interposed, Briscoe conveying him no interest, but imposing upon him a trust to do what is not forbidden by law, and the court must compel its execution whenever means are at hand available for the purpose.

It is obvious there are no means at hand if the transfer of ownership of the Mound plantation to Mrs. Briscoe vests the title entirely in her, but the successive steps by which that was done indicate unmistakably the scheme, concocted by Given and Briscoe, to foil all other creditors of Briscoe save those whom Given chose to use as instruments to accomplish their purpose, if indeed those persons thus used were creditors at all. That Given owed his mother-in-law, Mrs. Gregory, four thousand dollars we are willing to believe. The alleged debt to his wife of fifteen thousand — was manufactured for the occasion.

In order to make the plot effective it was essential that Briscoe should not own the plantation when he went into bankruptcy, and it was equally necessary that at its sale the nominal purchaser should be a tool of Given. The mortgage for fifty thousand dollars made to the Given firm, which did not represent nor secure a dollar of their existing debt, afforded the appliance that was needful to effect the transfer. The mortgage for fifty-six thousand dollars to Fellows, which was primed by the Given mortgage, was emasculated
54 by the division of it into sixty notes transferred to different persons, each of whom was powerless to interfere. No one of them could make the small amount of the note he held a basis for competition at the sale, and combination among them was impossible.

The Given firm had classed Briscoe as an ordinary debtor on their schedule in bankruptcy and Mrs. Gregory as an ordinary creditor. The Given mortgage notes were kept in the background. When the time for action arrived Mrs. Gregory appeared as the owner of three of these notes of ten thousand dollars each, tho other two never having been used, while at the sale under her executory process the whole mortgage of fifty thousand dollars is still of record. No one would be rash enough to bid against the apparent holder of the mortgage whose process had provoked the sale, and no one had an interest that could be protected but McLean, whose ranking mort-

gage for $4,517.87 alone stood in the way. He was quieted and provision made for his debt, as we shall see bye-and-bye.

Thus armed and equipped, Given and Briscoe, under cover of Mrs. Gregory, proceeded to the consummation. The Given mortgage was foreclosed and Mrs. Gregory bought for twenty thousand dollars. We attach no importance to the price and do not care whether it was a fair value or not. The only effect of a higher appraisement and a larger bid would have been to increase the
55 sheriff's commissions. This sale was in March, 1868.

Throughout that year the operations of the place went on as before. Briscoe was there directing and guiding as before, but with a complaisance unusual to men who had been stript of all they had by that hard hand of the law which never strikes without evoking an angry growl from its victim. He not only staid and "overseed," but did so gratuitously.

The sale was of all his earthly possessions and the house furniture, for the more sweeping and all-embracing the sheriff's deed to Mrs. Gregory the less there would be to go on Briscoe's list of property to be filed in the bankrupt court, and it was filed right on the heels of the sale, in the following month, so soon as the sheriff's deed with its plausible and fair-seeming exterior was spread on the public records to mock and falsify the doubts and surmises of incredulity.

The supplies sent to the plantation by Given were never thereafter marked with Briscoe's name, nor was the account kept with him. To have supposed that Given would neglect to make the marking of the pork barrels and the heading of the ledger conform to the requirements of the new situation would be an injustice to his fertility of invention and his sense of symmetry. Everything was done to produce verisimilitude, and as the year sped and the gravid earth, gathering its accumulated strength which two
56 years of barrenness had but husbanded, burst its bosom and spread before delighted eyes the rich spoils of an abundant harvest the excellent judgment of Mr. Given in advising his mother-in-law to this purchase was vindicated. The year closed with a balance of over nine thousand dollars to the credit of the plantation, but Mrs. Gregory was so obtuse in perceiving the excellence of her bargain that she not only unconditionally sold the plantation, but also transferred all the profits to Mrs. Briscoe so soon as the latter could qualify herself for the purchase by a judgment of separation of property, which, be it remembered, obtained no funds for her wherewith to buy. The cash payment stipulated at the sale is the exact amount of the McLean mortgage above mentioned, and it was paid by the proceeds of cotton raised on the plantation that year. It was impossible that the sum should have been Mrs. Briscoe's under any theory, except that the plantation was worked in her interest to tide over the time, when, Mr. Briscoe's discharge from bankruptcy and her judgment of separation of property obtained, she would be in position to take the title; and such was the fact.

The surplus of over nine thousand dollars was carried over to Mrs. Briscoe's credit precisely as if she had been the owner and cul-

tivator of the plantation all the time, it being reduced by the charge of McLean's debt and payment of lawyers' fees for foreclosing the mortgage upon her husband's plantation. Mrs. Gregory was
57 merely a person interposed to hold the title until this skilfully arranged plot could be slowly and cautiously worked out. She took the title and passed it to Mrs. Briscoe as an automaton, doing what she was bid by Given. She never saw the place. She was told, doubtless, that all these formalities were different steps needful to realize her money, and Given no doubt thought he was doing a great turn to Briscoe by screening from his creditors his fine plantation and doing an equally good turn to his family by hiding away from his own creditors over twenty thousand dollars for his mother-in-law and wife. The evidence makes patent the scheme to defraud Briscoe's creditors and to secure to Given's mother-in-law or through her to his wife what these plaintiffs in the present suit had the best right to.

From that time, December, 1868, to Briscoe's death, in 1880, the plantation has been in Mrs. Briscoe's name, and its operations enured ostensibly for her sole benefit, while really it had been Briscoe's property in fact (not so considered by him), and his management, good judgment, and skill have enabled him to pay the debt assumed to Mrs. Gregory. Now that he is dead and the trust accepted by him for the daughter of Andrews has terminated she and her son ask for its execution. We have said enough to show that they are entitled to it. Heirs Casanova *vs.* Acosta, 1 La., 186; Thibodeaux *vs.* Herpin, 6 A., 676; Spurlock *vs.* Mainer, 1 A., 302; Den-
58 nistown *vs.* Nutt, 2 A., 483; Succ. Ames, 33 A., 1331; Friedlander *vs.* Brooks, 35 A., 741.

There remains for consideration what is now the exigible part of the trust fund. Prescription is pleaded. It is obvious it will begin to run from the time each payment became due, unless some cause suspended it or unless from the nature of the obligation prescription will not apply at all.

The primary condition imposed by Andrews and accepted by Briscoe is that the fund should remain in the latter's hands until the several events occurred which were to determine the final disposition of it. The plaintiff could not have demanded the principal sum until the event occurred which should terminate the trust. Provision was made for every contingency except the death of the trustee. The principal was not payable to the plaintiffs unless after the death of Andrews, and then only in the event of his daughter's marriage and birth of issue. Briscoe's death made the principal demandable of his succession, but the annual payments were demandable as they fell due; still prescription would not begin to run during the continuance of the trust, nor until there was an unequivocal disavowal of it brought to the knowledge of the party entitled to it.

A payment was made in 1867, and in 1868 Briscoe regarded
59 the relation as one of trust and so denominated it in his bankrupt schedule. In 1872 he offered Mrs. Upshur a compromise, tendering $250 annually and $2,500 when he was able to

pay that sum. This is the first disclaimer of the relation of trustee and marks the point when his functions as such ceased, and from which prescription may be reckoned. South. Mut. Ins. Co. *vs.* Pike, 32 A., 488. The plea therefore bars recovery of the annual payment beyond ten years, and, consequently, those accruing before January 1, 1872, are lost, and so the lower judge ruled, allowing interest upon each sum annually due from the day it became due.

The lower court dismissed the demand for the principal sum for prematurity. Why premature, since Briscoe's death does not appear? If even there can come a time when it was proper to demand the sum entrusted to him, it was at his death, and no time was lost in preferring the claim when that event occurred.

It is therefore ordered and decreed that the judgment of the lower court be reversed in these particulars; that instead of rejecting the plaintiffs' demand the same is maintained, and the sales and conveyances by which Mildred Gregory received title to the Mound plantation and its appurtenances from the sheriff and by which she afterwards conveyed title to Mary E. Briscoe are annulled, cancelled, and set aside, and the property thus conveyed is declared to belong to the succession of William J. Briscoe, and to be liable to plaintiffs herein for the satisfaction of this judgment; and it is
60 further ordered and decreed that the plaintiffs have and recover of the succession of said Briscoe seven hundred dollars, with five per cent. interest thereon from January 1, 1872, and the same sum with same interest from the first of January of each succeeding year until paid, and the further sum of ten thousand dollars, and costs of this suit, and in other respects that the judgment be affirmed.

60*a* *Petition for Rehearing. Filed May 24th*, 1884.

In the Supreme Court.

UPSHUR *et al.*
vs.
WIDOW AND HEIRS OF BRISCOE } No. 9103.

Application for rehearing in behalf of the heirs of Briscoe.

As your honors have not passed upon what I consider the vital part of the controversy, I beg leave to again refer to it.

The opinion rendered in this case recites in full the instrument sued upon. If that instrument is illegal, then the plaintiffs' claim must fall.

That instrument is a donation *inter vivos*, which is defined by Bouvier as "a contract which takes place by mutual consent of the giver, who divests himself of the thing given in order to transmit the title of it to the donee gratuitously, and the donee who accepts and acquires the legal title to it."

Andrew certainly donated to Mrs. Upshur the right to claim the annual interest.

Such a right is subject to donation *inter vivos*, C. C., 1536;
60*b* but such an act of donation must be passed before a notary or it can have no effect.

The instrument sued on is an act under private signature. It is therefore a nullity.

It seems to me impossible to give that instrument any other construction; and if this view is correct, then plaintiffs cannot be entitled to judgment.

I therefore respectfully ask for a rehearing.

16 La., 271; 22 A., 97.

JULIUS ARONI,
Attorney for Heirs of Briscoe.

Petition for Rehearing. Filed May 26th, 1884.

Supreme Court of Louisiana.

Mrs. A. M. UPSHUR
vs.
WIDOW & HEIRS OF BRISCOE.

To the honorable the supreme court of the State of Louisiana:

The petition of Mrs. Briscoe, appellee herein, with respect prays a rehearing in this case on the grounds and for the reasons stated and elaborated in the argument below presented.

Respectfully,

E. D. WHITE.
J. W. MONTGOMERY.
STEELE & GARRETT.

61 *Rehearing Granted.*

Extract from the Minutes of Saturday, May 31st, 1884.

The court was duly opened pursuant to adjournment.

Present: Their honors Edward Bermudez, chief justice, and Felix P. Poche, Robert B. Todd, Charles E. Fenner, Thomas C. Manning, associate justices.

His honor the chief justice pronounced the judgment and decree of the court in the following case:

Mrs. A. M. UPSHUR *et al.*
vs.
WIDOW AND HEIRS OF BRISCOE. } No. 9103.

It is ordered that the rehearing applied for in this case be granted.

62 *Order for Oral Argument.*

Extract from the Minutes of Wednesday, November 5th, 1884.

The court was duly opened pursuant to adjournment.

Present: Their honors Edward Bermudez, chief justice, and Felix

P. Poche, Charles E. Fenner, Robert B. Todd, Thomas C. Manning, associate justices.

A. M. UPSHUR *et al.*
vs.
WIDOW AND HEIRS OF BRISCOE. } No. 9103.

In this case the application for oral argument heretofore prayed for was granted.

63 *Argued and Submitted.*

Extract from the Minutes of Saturday, November 22d, 1884.

The court was duly opened pursuant to adjournment.

Present: Their honors Edward Bermudez, chief justice, and Felix P. Poche, Robert B. Todd, Charles E. Fenner, Thomas C. Manning, associate justices.

Mrs. A. M. UPSHUR *et al.*
vs.
WIDOW AND HEIRS OF BRISCOE. } No. 9103.

This case was duly called for trial, when, after hearing argument of counsel, Wade R. Young for plaintiff and appellant and E. D. White for defendant and appellee, the same was taken under advisement upon the papers and briefs on file.

64 *Final Decree.*

Extract from the Minutes of Monday, March 16, 1885.

The court was duly opened pursuant to adjournment.

Present: Their honors Edward Bermudez, chief justice, and Felix P. Poche, Robert B. Todd, Thomas C. Manning, Charles E. Fenner, associate justices.

His honor Justice Fenner pronounced the opinion and judgment of the court in the following case:

ANNIE M. UPSHUR *et al.*
vs.
WIDOW AND HEIRS OF BRISCOE. } No. 9103.

Appeal from the 9th judicial district court, parish of Tensas.

On rehearing.

It is ordered, adjudged, and decreed that our former decree herein be revoked and set aside, and it is now ordered, adjudged, and decreed that the judgment appealed from be amended so as to condemn the succession of Briscoe to pay to plaintiffs the sum of seven hundred dollars, with five per cent. interest from January 1st, 1872, and the same sum with like interest for each succeeding year, and the further sum of ten thousand dollars and costs of the suit, and

that in all other respect, including the limitations on said monied judgment, the same be now affirmed, plaintiffs and appellants to pay costs of this appeal.

In this case Mr. Justice Manning read a concurring opinion.

65 *Opinion on Rehearing.*

Supreme Court of the State of Louisiana.

CLERK'S OFFICE,
NEW ORLEANS, *March 16th*, 1885.

ANNIE M. UPSHUR *et al.*
vs.
MARY E. BRISCOE *et als.* } No. 9103.

On rehearing.

Mr. Justice Fenner pronounced the opinion and decree of the court in the words and figures following, to wit:

The plaintiff is Annie M. Andrews, now the widow of John B. Upshur, and her son and only child, now of age, is coplaintiff.

The defendant Mary is the childless widow of Wm. J. Briscoe, and her codefendants are his legal heirs.

The action is based upon the following written instrument:

STATE OF LOUISIANA,
Parish of Tensas.

James Andrews
to
Annie M. Andrews. } Donation.

Know all men by these presents that I, James Andrews, of said parish and State, do nominate, constitute, and appoint William J. Briscoe, also of said parish and State, my true and lawful attorney, for me and in my name to pay or cause to be paid to Annie M. Andrews the sum of $700 annually, said amount to be paid at
66 the counting-house of some commission merchant or at some banking-house in the city of New Orleans, in equal quarterly installments of $175 each, said commission or banking house to be named and specified before the day of payment to the said W. J. Briscoe and the said Annie M. Andrews, subject to the conditions and restrictions hereinafter enumerated, viz: The payments are to be regularly made, as above set forth, according to the discretion of the said William J. Briscoe, of the general good conduct of the said Annie M. Andrews, which conduct must, in all respects, comport with the character and bearing of a discreet, prudent female.

The said William J. Briscoe, being here present, accepts this appointment and trust and binds himself to carry out the provisions of the same according to its true intent and meaning; and I do fur-

ther constitute and appoint the said William J. Briscoe my attorney-in-fact, to have and receive the sum of $10,000, to be held by him for the benefit of the said Annie M. Andrews, subject to the conditions hereinafter enumerated, viz:

It is understood that the annual payments of $700, as above secured, shall be considered as interest upon said amount of ten thousand dollars, and, first, it is provided that, in case the said Annie M. Andrews shall hereafter marry and leave issue, this amount of $10,000 shall remain invested, as heretofore, in the hands of the said William J. Briscoe, and the interest shall continue to be paid
67 as heretofore mentioned; and, in case of the death of the said Annie M. Andrews, such children, legal issue of her, shall become possessed of the above amount of $10,000 unconditionally, in full possession, to be paid by the said William J. Briscoe; second, it is provided that in case of my death occurring before that of the said Annia the above amount of $10,000 shall be placed unconditionally in her hands by the said William J. Briscoe, provided only she shall have no legal issue. In case, however, she shall at the time of my death have a child or children, legal issue of her body, then the provision heretofore enumerated shall be strictly adhered to; and, third, it is provided that in case at the death of the said Annie without legal issue of her body surviving, then the above sum of $10,000 shall revert to me, my heirs or assigns.

Thus done and signed at St. Joseph, in said parish and State, this 25th January, 1857, in presence of Geo. W. Williams and Edgar D. Farrar, competent witnesses.

JAMES ANDREWS.

G. W. WILLIAMS.
E. D. FARRAR.

And now to these presents also comes W. J. Briscoe, who accepts this mandate in all its clauses and binds himself to faithfully carry the same into effect, and, the more effectually to secure the faithful performance of the same, he also binds himself as surety for the said James Andrews that the within mandate and all the stipulations therein contained shall be well and faithfully executed, and
68 that the same shall be complied with in all its clauses.

Thus done and signed at St. Joseph, on the 26th day of January, 1857, in the presence of G. W. Williams and Edgar D. Farrar.

W. J. BRISCOE.

Witnesses:
G. W. WILLIAMS.
E. D. FARRAR.

At the same time and place also came the said Annie M. Andrews, who hereby declares that she accepts the above in all its parts and clauses, ratifying and accepting the appointment of the said William J. Briscoe as her trustee and binding herself to confirm and abide by the above mandate in all its provisions.

Thus done & signed at St. Joseph, on the 26th day of January, 1857, in the presence of George W. Williams and Edgar D. Farrar.

ANNIE M. ANDREWS.

Witnesses:

G. W. WILLIAMS.
E. D. FARRAR.

The objects of this action are: To recover judgment against the heirs or succession of Briscoe; to annul the title held — Mrs. Briscoe to the Mound plantation, and to have said plantation declared to belong to the succession of Briscoe, and to be subject to the satisfaction of the claim of plaintiffs.

Various defenses are interposed; amongst others, a plea of Briscoe's discharge in bankruptcy.

69 Since the rendition of our original opinion and decree herein the Supreme Court of the United States has rendered its decision in the case of Hennequin *vs.* Clews, reported in 111 U. S. Reports, p. 680, which has altered our conclusions as to the effect of the discharge in bankruptcy.

Since the adoption of the bankrupt act of 1867 the State courts and the inferior Federal courts have been divided upon the question as to the effect and true meaning of the 33d section of said act, which declares that "no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any other fiduciary character, shall be discharged under this act."

A similar clause in the earlier bankrupt act of 1841, though couched in different verbiage, has been construed to apply only to technical trusts, such as those of public officers, executors, administrators, guardians, and trustees, and not to include the implied trusts resulting from the relation of agents, factors, commission merchants, etc. Chapman *vs.* Forsyth, 2 How., 202.

Some courts have taken the view that the same limitations were applicable to the terms "fiduciary character" as used in the act of 1867, while others, including this court, have held that the language of the latter act, being conceived in broader terms, em-

70 braced agents, factors, etc., as persons "acting in a fiduciary character" within the meaning of the law.

This vexed question has never been definitely and authoritatively settled by the Supreme Court of the United States in the recent decision referred to, which holds, in the sense of Chapman *vs.* Forsyth, that the terms only apply to technical trusts.

Thus the decisions of this court in the cases of Benning *vs.* Bleakley, 27th A., 257, and Desobey *vs.* Tete, 31 A., 809, besides others, have been overruled by the Supreme Court of the United States, and the question being purely Federal, we must henceforth adopt the view of the latter tribunal.

We are now satisfied that, acting under our former jurisprudence, we gave too much weight to the agency declared in the instrument upon which this suit was brought as affecting the question of Briscoe's fiduciary character, whereas under the decision first referred to it is entitled to no weight whatever.

Nor is the term trust as used in the instrument of greater weight for the question after all is not whether the transaction is called a trust, but whether it is a trust within the meaning of the bankrupt act. Suppose an instrument of this kind to be presented: "This witnesseth that A has this day delivered to B $10,000 in cash upon the trust that he is to pay A interest thereon, at the rate of
71 seven per cent. per annum, on the first day of January of each current year, and at the end of five years is to return to A the said sum of $10,000," would any one contend that such an instrument created a trust within the meaning of the bankrupt act or was evidence of anything but an ordinary contract of loan?

Now, a close analysis of the instrument here sued on reveals the following essential elements: That Andrews delivered to Briscoe $10,000, for which Briscoe obligated himself to pay seven per cent. interest annually. This interest was to be paid to Annie M. Andrews during her life or that of Briscoe, with the discretion, however, of withholding it from her in case of her improper deportment; but the obligation to pay the interest was, nevertheless, absolute and unconditional, and if he judged Annie M. Andrews unworthy to receive it, it would have remained as a debt due the ultimate beneficiary of the capital. This is apparent from the absence of any indication of a purpose to let Briscoe have the use of the money without interest, and from the incongruity of construing otherwise the discretion confided to him of judging of her worthiness to receive it; for, if by deciding against the propriety of her conduct he could absolve himself from the obligation of paying the interest at all, it would create an antagonism between his duty and his interest which could find no support in the rational interpretation of the writing. Therefore we say he was absolutely
72 and unconditionally bound to pay interest on the money as long as he held it. This unquestionably implied the right to use the money and to use it as his own, for no authority is given to make particular investments of it for account of the beneficiary, and such investments would have been at his own exclusive risk, and if unfortunate, however prudently made, they would have furnished him no excuse for non-payment of either principal or interest. It imposed the further obligation of returning the $10,000 (together, as we have shown, with any unpaid interest) to the beneficiary named or to Briscoe or his heirs or assigns in certain definite contingencies named and not necessary here to detail.

Such is the plain import of the provisions of the so-called "trust." In the language of the Supreme Court of the United States, "If the act embrace such a debt it will be difficult to limit its application. It must include all debts arising from agencies and, indeed, all cases where the law implies an obligation from the trust imposed in the debtor. Such a construction would have left but few debts on which the law could operate. In almost all the commercial transactions of the country confidence is reposed in the punctuality and integrity of the debtor, and a violation of these is in a commercial sense a disregard of a trust. But this is not the relation spoken of in the act."

73 Chapman *vs.* Forsyth, 2 How., 208.

Such is precisely the character of the trust reposed in Briscoe—a trust simply in his "punctuality and integrity"—the same trust which lies at the base of every agency and of every loan or other credit. The fact that this trust is expressed in the instrument adds nothing to its nature, force, or effect. Had not the word "trust" been used it would, nevertheless, have been impled in identical measure and strength.

The Supreme Court has held that a commission merchant who has made away with goods consigned to him by his customer and failed to account for the proceeds, or a pledger who has disposed of collaterals and failed to produce or account for them when his debt is paid, are not exempt from discharge under the terms of the act.

See cases above cited, and also Neal *vs.* Clark, 95 U. S., 594; Wolf *vs.* Stix, 99 U. S., 1.

It would be a mockery of reason to hold such debts subject to discharge and exclude such an one as that of Briscoe. The commission merchant and pledgee above alluded to had committed acts of positive fraud and turpitude, punishable under the criminal statutes of the State. What has Briscoe done? He merely ventured the money confided to him, as he had the right to do, and lost it, as he ran the inevitable risk of doing. In failing to pay according to the obligation assumed, in the language of the U. S. Supreme
74 Court, "he is not regarded as guilty of a breach of trust, but only of a breach of contract."

Indeed, considering the language of the act, which refers only to "debts created while acting in a fiduciary character," we incline to adopt the opinion of the supreme court of Massachusetts, "that the phrase implies a fiduciary relation existing previously to or independent of the particular transaction from which the debt arose." Cronan *vs.* Cutting, 104 Mass., 246. This would entirely exclude Briscoe's case, because all his obligations arose out of the very transaction which gave rise to the trust.

But under every aspect of the case, considering the authoritative construction now placed upon the act, we conclude that Briscoe's debt was discharged by the bankruptcy.

It is urged, however, that as the discharge in bankruptcy is not pleaded by the heirs of Briscoe, but only by his widow, whose title to the property sought to be subjected to the debt is herein attacked as a fraudulent simulation, the latter is not entitled to the benefit of such discharge, which is personal to the bankrupt. The plaintiffs, in support of this proposition, rely upon the case of Mayer *vs.* Dewey, 103 U. S., 301. That case is differenced from this by two distinctions, which destroy its application: 1st. The transfer of property there attacked took place prior to the bankruptcy, while that here
75 assailed arose subsequently thereto, so far as Mrs. Briscoe is concerned. 2d. Judgments had been rendered against the debtor in that case subsequently to the bankruptcy, although founded on debts existing prior to his discharge.

Thus the attacking creditors in that case were unquestioned creditors at the date of the transfer, and they remained creditors by

subsequent judgment at the date of their suit; but here the transfer to Mrs. Briscoe took place after the discharge in bankruptcy, at a time when the debts here sued on were barred and without revival by subsequent judgment. As we have held in the case of Scott *vs.* Castelman, decided this day, the heirs were estopped from attacking Mrs. Briscoe's title in their own right. We cannot admit that, by simply omitting to plead the discharge of their ancestor, they can turn loose upon Mrs. Bristow the creditors of their ancestor, whose debts were barred at the time when she acquired her title. Mrs. Bristoe, deriving her title, as is alleged, from Briscoe, is entitled to the full benefit of the position in which he stood at the date of transfer, and to all the defenses resulting therefrom. She cannot be deprived of the benefit of his discharge in bankruptcy by the failure of his heirs to plead it, but is entitled to plead such discharge in her own defense.

This dispenses us with the necessity of reviewing our for-
76 mer decision on the merits of this controversy, and we content ourselves with the remark that all that was there said may be regarded as not having been said.

The heirs, who are sued as representatives of the succession of Briscoe, having failed to plead the discharge in bankruptcy, the personal judgment against the succession must stand, which, however, we understand to be of no moment, as its execution is restricted to the property of the succession, which consists of *nulla bona*. And this, doubtless, is the reason why the plea has been omitted.

It is therefore ordered, adjudged, and decreed that our former decree herein be revoked and set aside; and it is now ordered, adjudged, and decreed that the judgment appealed from be amended so as to condemn the succession of Briscoe to pay to plaintiffs the sum of seven hundred dollars, with five per cent. interest from January 1st, 1872, and the same sum, with like interest, for each succeeding year, and the further sum of ten thousand dollars and costs of suit, and that in all other respects, including the limitations on said monied judgment, the same be now affirmed, plaintiffs and appellants to pay costs of this appeal.

77 Supreme Court of the State of Louisiana.

CLERK'S OFFICE, NEW ORLEANS, *March 16th*, 1885.

ANN M. UPSHUR *et al.*
vs.
MARY E. BRISCOE *et als.* } No. 9103.

By Mr. JUSTICE MANNING:

As the organ of the court in Desobry *vs.* Tete, 31 A., 819, after reciting the conflicting decisions of the State and U. S. circuit courts upon the interpretation of the bankrupt act touching the discharge of fiduciary obligations, I said: "The words 'while acting in a fiduciary capacity,' employed in the act of 1867, will be construed

in each State with reference to its own legislation, and the present contrariety of opinion will doubtless continue until a decision of the U. S. Supreme Court shall have definitely settled their interpretation."

Since the first opinion in this case was rendered, in May of last year, that court has definitely settled the interpretation of those words in the decision cited in the opinion just read. It is a Federal question and I accept the determination of it as binding.

But I have not the shadow of a doubt that the scheme for placing the title of this property in Mrs. Briscoe was concocted and
78 carried out as detailed in the opinion I read on the first hearing of this case, and I can only deplore that the arm of the law, which ought to be strong enough to shatter such schemes, is made powerless by the shield thus interposed for their protection.

79 *Petition for Writ of Error. Filed March 14th*, 1887.

To the honorable Chief Justice and associate justices of the Supreme Court of the United States:

The petition of Mrs. Annie Upshur and James A. Upshur, plaintiffs in a certain suit lately tried and determined on appeal in the honorable supreme court in the State of Louisiana, entitled Mrs. Annie M. Upshur *et al. vs.* Mrs. Mary E. Briscoe *et al.*, No. 2103, wherein Mary E. Briscoe, widow, and Mrs. Betty Scott and G. Carneal Goldman, her husband, and Mrs. Elizabeth Andrews and Thos. P. Clinton, her husband, and Mrs. James Andrews and Duncan Chamberlain, her husband, were defendants, respectfully shows that they have been aggrieved by the judgment and decree of said court rendered in said suit, and desire to remove said suit into this honorable court by writ of error, in order that said judgment may be reexamined and reversed in this court.

They show that in said suit, as fully appears from the duly certified copy of the mandate and decree hereto annexed, there was drawn in question a right, title, privilege, or immunity claimed by your petitioners under a law of the United States, and that the judgment and decree of the said supreme court of Louisiana, being the highest court in the State in which a decision in the suit could be had, was against the title, right, privilege, or immunity spe-
80 cially set up or claimed by your petitioners.

Your petitioners show that they filed their complaint against the defendant heirs and legal representatives and against the defendant widow of William J. Briscoe, deceased, in the 9th district court for the parish of Tensas and State of Louisiana, to enforce against said heirs of deceased the obligations of the trust set out in the instrument annexed to their said petition and reproduced in full in the opinion and decree of the supreme court of Louisiana, of which a duly certified copy is hereto annexed, and to have the apparent title of the defendant widow to the Mound plantation described in their petition decreed to be a fraudulent simulation, contrived and intended by the said deceased to defraud petitioners and to defeat the enforcement of the obligations of the aforesaid trust,

and the said plantation adjudged to be the property of the estate of the said William J. Briscoe, deceased, and subject to the payment of the debt of said deceased to petitioners.

That in their said petition they alleged the discharge of said Briscoe in bankruptcy, and claimed to be exempt from the operations of said discharge by virtue of the provisions of section 5117 of the Revised Statutes of the United States.

That the defendants herein in their several defenses failed to plead the discharge in bankruptcy, and thereby waived all benefit of said plea, if any such they could have had.

81 That the defendant widow alleged fraudulent assign- of the property of the deceased, specially plead the discharge of said deceased in bankruptcy, and claimed the benefit of said discharge as enuring to herself in bar of the action to revendicate the property; that, no replication being permitted in the Louisiana practice, no demurrer to such plea could be filed, but all issues therein were joined tacitly.

That in the first opinion and decree rendered in the supreme court of Louisiana judgment was pronounced in favor of petitioners and against defendant heirs for the sum of ten thousand dollars, as the principal of the trust fund, and for the sum of seven hundred dollars, with five per cent. per annum interest for each year from January 1st, 1872, as the annual payments agreed to be made, and against the defendant widow, declaring her title to said plantation to be a fraudulent simulation and subjecting said plantation to the judgment.

That a rehearing was granted and a second opinion and decree rendered, in which the former judgment against the defendant heirs was affirmed, but the judgment against the defendant widow reversed, and the demand for the revendication of the property rejected for the sole reason that the instrument of trust upon which petitioners relied set out an implied trust and not such a technical trust as is exempt from the operation of the bankrupt act.

82 Your petitioners show that the supreme court of Louisiana has erred in said judgment and decree so rendered, and for cause of error assign:

1st. That the instrument of trust relied on sets out not an implied trust, but an express, private discretionary trust for the use of the *cestui que trust* for life, with remainder over to the heirs of her body, and failing such issue with reversion to the heirs of the donor, and the payment of the annual allowance, being in the trustee's discretion and approbation of the good conduct of the *cestui que trust*., is the most technical trust known to the English system which under the name of the common law entered into the contemplation of the framers of the aforesaid section 5117 of the Revised Statutes.

2d. That if said instrument does set out an implied trust which falls within the operation of the bankrupt act, and not such an express technical trust as is excepted, which petitioners deny, and the obligation of the contract has been extinguished by the discharge in bankruptcy, such discharge, not having been plead by the

heirs, cannot avail the defendant widow, fraudulent assign, who can take no benefit or advantage of her said plea.

That by the interpretation of the bankrupt act by your honorable court the discharge in bankruptcy is personal to the
83 bankrupt, his heirs and legal representatives, and does not avail a fraudulent assign.

Moyer *vs.* Dewey, 103 U. S., 301.

Nor does such discharge cease to be personal or any more avail the fraudulent assign because in this case the fraudulent conveyance succeeded the adjudication in bankruptcy.

That the questions presented by the aforesaid assignment of errors are purely Federal in their character and necessitate a correct interpretation of the bankrupt act, and being the sole ground assigned in the opinion of the supreme court of Louisiana for reversing their former judgment and rejecting the demand for the revendication of the property, your petitioners desire to have said decision re-examined in this honorable court.

Hennequin *et al. vs.* Clews *et al*, 111 U. S., 676.

Your petitioners show that the judgment of the supreme court of Louisiana was rendered March 16th, 1885, and that a writ of error was allowed by Mr. Justice Harlan July 23d, 1885, but that they were unable to prosecute said suit because the clerk of the supreme court of Louisiana required them to take and pay for a full, true, and complete copy of the record, as if on appeal, containing the note of evidence, with all the papers, documents, and depositions used in the trial of the appeal in the supreme court of Louisiana, which are entirely unnecessary to the decision of the
84 Federal questions in this court, at a cost of four hundred and fifty dollars, to be paid to him, said clerk, and a probable additional cost of fifteen hundred dollars in this court, which was entirely beyond the means of petitioners; that a second writ of error was allowed by Mr. Justice Wood in the year 1886, and while your petitioners were awaiting the decision of your honorable court in the Ralston case as to the contents of the record necessary to be transmitted to this court their said writ was dismissed for failure to prosecute.

Wherefore, the premises considered, your petitioners tender herewith their petition and bond, conditioned according to law, and pray that said bond be approved and a writ of error allowed to the supreme court of Louisiana to remove said suit into this honorable court, and that the several defendants herein named be cited to answer thereto, and that the decision of the said supreme court of Louisiana against the title, right, privilege or immunity claimed by your petitioners be re-examined and reversed with costs in this behalf.

(Signed) WADE R. YOUNG, *Of Counsel.*

85 *Bond for Writ of Error. Filed March 14th*, 1887.

Mrs. ANNIE M. UPSHUR
vs.
Mrs. MARY E. BRISCOE *et al.* } No. 9103.

Know all men by these presents that we, Mrs. Annie M. Upshur and James A. Upshur, as principals, and William C. Young, as surety, are held and firmly bound unto Mrs. Mary E Briscoe, Mrs. Elizabeth Andrews and Thomas P. Clinton, her husband; Mrs. Frances Andrews and Duncan Chamberlain, her husband, and Mrs. Betty Scott and G. C. Goldman, her husband, in the full and just sum of five hundred dollars, to be paid to the said obligors, their attorneys, administrators, or assigns, and which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 6th day of January, 1887.

Whereas lately, at term of the supreme court of Louisiana, in a suit depending in said court between the obligors, as plaintiffs, and the obligees, as defendants, judgment was rendered against said obligors, and the said obligors having obtained a writ of
86 error and filed a copy thereof in the clerk's office of said court to reverse the judgment in the aforesaid suit, and a citation directed to the said obligees, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said plaintiffs shall prosecute their writ to effect and shall answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) MRS. ANNIE M. UPSHUR,
Per WADE R. YOUNG, *Att'y.*
" W. C. YOUNG.

Sealed and delivered in presence of—
(Signed) A. B. WEINTER.
" A. F. BROWN.

Approved, but not to operate as a supersedeas.
(Signed) M. R. WAITE,
Chief Justice U. S.

STATE OF LOUISIANA, }
Parish of Tensas. }

Before me, the undersigned authority, personally came and appeared William C. Young, who, being by me duly sworn, deposes and says that he owns and is possessed of property, rights, and credits which can be taken in execution over and above his liabilities and exemptions to an amount exceeding the sum of five hundred dollars.

(Signed) W. C. YOUNG.

87 [SEAL.] Sworn to and subscribed before me January 6th, 1887.

(Signed) JOS. CURRY,
Clerk 9th Dist. Court, Tensas Parish, La.

I, Joseph Curry, clerk of the 9th district court for the parish of Tensas, whose duty it is made by law to take and approve bonds in judicial proceedings in said court, certify that William C. Young, whose genuine signature above appears, is a good and sufficient surety for the sum of five hundred dollars.

[SEAL.] In testimony whereof I have hereunto set my hand and seal this 6th day of January, 1887.

(Signed) JOS. CURRY,
Clerk 9th Dist. Court, Tensas Parish, La.

88 *Certificate of Clerk.*

UNITED STATES OF AMERICA, }
State of Louisiana. }

Supreme Court of the State of Louisiana.

I, George W. Dupre, clerk of the supreme court of the State of Louisiana, do hereby certify the foregoing pages to contain a true and correct extract from the record of the proceedings had in the 9th judicial district court for the parish of Tensas, State of Louisiana, wherein Mrs. Annie M. Upshur *et al.* were plaintiffs and the Widow and Heirs of Briscoe were defendants, which record is on the files of this court under No. 9103. I further certify said pages to contain a full and complete transcript of all the proceedings had in this honorable court on appeal.

In testimony whereof I have hereunto set my hand and affixed the seal of this honorable court, at the city of New Orleans, this 14th day of May, A. D. 1887, and in the 110th year of the Independence of the United States of America.

Seal Supreme Court of the State of Louisiana.

GEORGE W. DUPRE, *Clerk.*

89 *Certificate of Chief Justice.*

UNITED STATES OF AMERICA, }
State of Louisiana. }

Supreme Court of the State of Louisiana.

I, Edward Bermudez, chief justice of the supreme court of the State of Louisiana, do hereby certify that George W. Dupre is clerk of the supreme court of the State of Louisiana; that the signature of George W. Dupre to the within certificate is in the proper handwriting of him, the said clerk; that said certificate is in due form of law, and that full faith and credit are due to all his official acts as such.

In testimony whereof I have hereunto set my hand and affixed the seal of this honorable court, at the city of New Orleans, this 14th day of May, A. D. 1887, and in the 110th year of the Independence of the United States of America.

Seal Supreme Court of the State of Louisiana.

E. BERMUDEZ,
Chief Justice.

90 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the supreme court of the State of Louisiana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Annie M. Upshur and James A. Upshur, plaintiffs, and Mary E. Briscoe, widow; Mrs. Betty Scott and G. Carneal Goldman, her husband; Mrs. Elizabeth Andrews and Thomas P. Clinton, her husband, and Mrs. Frances Andrews and Duncan Chamberlain, her husband, defendants, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the

91 Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said plaintiffs, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the

said Supreme Court, the fifteenth day of February, in the year of our Lord one thousand eight hundred and eighty-seven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
M. R. WAITE,
Chief Justice U. S.

92 [Endorsed:] No. 9103. Supreme court of La. Mrs. Annie M. Upshur *et al. vs.* Mrs. Mary E. Briscoe *et al.* Writ of error. Supreme court of Louisiana. Filed Mar. 14, 1887. George W. Dupre, clerk.

93 The United States of America to Mary E. Briscoe, widow; Mrs. Betty Scott and G. Carneal Goldman, her husband; Mrs. Elizabeth Andrews and Thomas P. Clinton, her husband, and Mrs. Frances Andrews and Duncan Chamberlain, her husband, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Louisiana, wherein Annie M. Upshur and James A. Upshur are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this fifteenth day of February, in the year of our Lord one thousand eight hundred and eighty-seven.

M. R. WAITE,
Chief Justice U. S.

94 On this nineteenth day of March, in the year of our Lord one thousand eight hundred and eighty-seven, personally appeared A. B. C. Winter, deputy sheriff, before me, the subscriber, Joseph Curry, clerk of the 9th district court, Tensas parish, La., and makes oath that he delivered a true copy of the within citation to Mrs. Elizabeth Andrews & a true copy to Mrs. Mary E. Briscoe in person and in this parish on the 11th day of March, 1887, and that he delivered a true copy to Mrs. Betty Scott in person & in this parish on the 18th day of March, 1887.

A. B. C. WINTER,
Deputy Sheriff, Tensas Parish, Louisiana.

Sworn to and subscribed the 19th day of March, A. D. 1887.

[Seal of the Clerk of the Parish of Tensas.]

JOS. CURRY,
Clerk 9th Dist. Court, Tensas Par., La.

On this eight- day of October, in the year of our Lord one thousand eight hundred and eighty-seven, personally appeared Harrison Stewart, deputy sheriff, before me, the subscriber, Joseph Curry, clerk of the 9th district court, Tensas parish, Louisiana, and makes oath that he delivered a true copy of the within citation to Mrs. Francis Andrews in person at her domicil, in the county of Jefferson, State of Mississippi, on the 4th day of October, 1887.

HARRISON STEWART,
Deputy Sheriff, Tensas Parish, Louisiana.

Sworn to & subscribed before me this 8th Oct., 1887.

[Seal of the Clerk of the Parish of Tensas.]

JOS. CURRY,
Clerk 9 Dist. Court, Tensas Par., La.

95 [Endorsed:] Supreme Court U. S. 1887, October term. No. 1113. Annie M. Upshur & *al.*, pl'ffs in error, *vs.* Ann Eliza Rhoads, adm'x, &c. Citation.

[Stamped:] Office Supreme Court U. S. Filed Oct. 11, 1887. James H. McKenney, clerk.

Endorsed on cover: Louisiana supreme court. No. 146. Annie M. Upshur and James A. Upshur, plaintiffs in error, *vs.* Mary E. Briscoe, widow; Mrs. Betty Scott and G. Carneal Goldman, her husband; Mrs. Elizabeth Andrews and Thomas P. Clinton, her husband, and Mrs. Frances Andrews and Duncan Chamberlain, her husband. Filed October 5, 1887.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 146.

MRS. ANNIE M. UPSHUR, et al., Plaintiffs in Error

vs.

MRS. MARY E. BRISCOE, et al.

In error to the Supreme Court of Louisiana.

BRIEF OF PLAINTIFFS IN ERROR.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 146.

MRS. ANNIE M. UPSHUR, et al., Plaintiffs in Error

vs.

MRS. MARY E. BRISCOE, et al.

In error to the Supreme Court of Louisiana.

BRIEF OF PLAINTIFFS IN ERROR.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

May it please your honors! This is a writ of error to reverse the judgment of the Supreme Court of Louisiana, for the errors assigned.

First—That the court erred in deciding that a third person, fraudulent assign, could plead the discharge of the debtor in bankruptcy.

Second—That the court erred in deciding that an express, private, discretionary trust, with a remainder and a reversion, was affected by the discharge of the trustee in bankruptcy.

STATEMENT OF FACTS.

The plaintiffs are the daughter of James Andrews and her son.

The defendant, Mary E. Briscoe, is the widoww of William J. Briscoe, and her codefendants are his nieces and heirs at law.

The suit is based upon this instrument of trust:

"Know all men by these presents, that I, James Andrews, of said parish and State, do nominate, constitute and appoint William J. Briscoe, also of said parish and State, my true and lawful attorney for me and in my name, to pay, or cause to be paid, to Annie M. Andrews the sum of $700 an-

nually; said amount to be paid at the counting house of some commission merchant, or at some banking house in the city of New Orleans, in equal, quarterly installments of $175 each; said commission or banking house to be named and specified before the day of payment to the said W. J. Briscoe, and the said Annie M. Andrews, subject to the conditions and restrictions hereinafter enumerated, viz: The payments are to be regularly made as above set forth, according to the discretion of the said William J. Briscoe, of the general good conduct of the said Annie M. Andrews, which conduct must in all respects comport with the character and bearing of a discreet, prudent female. The said William J. Briscoe being here present, accepts this appointment and trust, and binds himself to carry out the provisions of the same, according to its true intent and meaning, and I do further constitute and appoint the said William J. Briscoe my attorney in fact, to have and receive the sum of $10,000, to be held by him for the benefit of the said Annie M. Andrews, subject to the conditions hereinafter enumerated, viz: It is understood that the annual payments of $700, as above secured, shall be considered as interest upon the said amount of $10,000, and first—It is provided that in case the said Annie M. Andrews shall hereafter marry and have issue, this amount of $10,000, shall remain invested as heretofore in the hands of the said William J. Briscoe, and the interest shall continue to be paid as heretofore mentioned; and in case of the death of the said Annie M. Andrews, such children, legal issue of her, shall become possessed of the above amount of $10,000, unconditionally, in full possession, to be paid by said William J. Briscoe. Second—It is provided that in case of my death occurring before that of the said Annie, the above amount of $10,000 shall be placed unconditionally in her hands by the said William J. Briscoe, provided only she shall have no legal issue. In case, however, she shall at the time of my death leave a child or children, legal issue of her body, then the provision, heretofore enumerated, shall be strictly adhered to; and Third—It is provided that in the case of the death of the said Annie M. Andrews, without legal issue of her body surviving, the above sum of $10,000 shall revert to me, my heirs, or assigns.

This done and signed at St. Joseph, in said parish and State, this 25th of January, 1857, in presence of George W. Williams and Edgar D. Farrar, competent witnesses.

JAMES ANDREWS.

G. W. WILLIAMS.
E. D. FARRAR.

And now to these presents also comes William J. Briscoe,

who accepts this mandate in all its clauses, and binds himself faithfully to carry the same into effect, and the more effectually to secure the faithful performance of the same, he also binds himself as surety for the said James Andrews, that the within mandate and all the stipulations therein contained, shall be well and faithfully executed and that the same shall be complied with in all its clauses. This done and signed at St. Joseph, on the 25th day of January, 1857, in presence of G. W. Williams and Edgar D. Farrar.

W. J. BRISCOE.

G. W. WILLIAMS.
E. D. FARRAR.

And at the same time and place, also came the said Annie M. Andrews, who hereby declares that she accepts the above in all its parts and clauses, ratifying and accepting the appointment of the said William J. Briscoe, as her trustee, and binding herself to confirm and abide by the said mandate in all its provisions. This done and signed at St. Joseph, on the 26th day of January, 1857, in the presence of George W. Williams and Edgar D. Farrar.

ANNIE M. ANDREWS.

G. W. WILLIAMS.
E. D. FARRAR.

Recorded in book of wills and donations, Tensas parish, February 18, 1857."

The payments of $700 were annually made until the outbreak of the war between the States, the last regular payment in course having been made in January, 1861. One other payment was made after the close of the war, viz., in April, 1867, none since that date. James Andrews died in 1860. Briscoe married the defendant, Mary, in 1866, and died in 1880. In February, 1866, Briscoe mortgaged the plantation in controversy to Given, Watts & Co., for $50,000. This mortgage was transferred to Mrs. Gregory, the mother-in-law of Given, and was foreclosed by her, and the property sold and adjudicated to her, in March, 1868, for $20,000. In April, Briscoe went into bankruptcy, with $2,000 of assets and $150,000 of debts, and Given, Watts & Co., and Given, also went into bankruptcy. Briscoe and his wife remained on the place, he managing it as usual outwardly, but under a power of attorney from Mrs. Gregory, and with no salary. The supplies were sent in Mrs. Gregory's name by Given, and the advances in like manner, and both were charged to the Mound plantation. Briscoe's wife sued him for separation of property in November. She had no estate. She was a housekeeper when Briscoe married her. In December Mrs.

Gregory conveyed to Mrs. Mary E. Briscoe the plantation, and all that was thereon, for the ostensible price of $4,517.83 cash, and $25,000 credit, extending through five years. When this sale was made there was in Given's hands the sum of $9,102.48, net proceeds of the cultivation of that year, which was transferred after the sale to the credit of Mrs. Briscoe. The plantation was worked thereafter in the name of Mrs. Briscoe as owner, her husband being her manager or agent. He died in 1880.

This suit was instituted in 1881 by the plaintiffs, Mrs. Annie M. Upshur, as *cestui que* trust, and her son James A. Andrews, as remainder man, against the defendants named as heirs at law of Briscoe, and against the defendant Mary E. Briscoe as fraudulent assign. Its object is to recover a judgment for the $10,000, and for each of the unpaid annual installments, and to make it effective against the property.

The defendants plead various defenses, of which it is necessary to notice only that of bankruptcy. This plea was filed by the defendant widow alone, in bar of the suit to revendicate the property. On the first hearing, in 1884, the Supreme Court of Louisiana decreed that the sales and conveyances by which Mildred Gregory received title to the Mound plantation, and by which she afterwards conveyed title to Mary E. Briscoe, be annulled, cancelled and set aside, and that the property thus conveyed be declared to belong to the succession of William J. Briscoe, and to be liable to the plaintiffs for the satisfaction of their judgment; and that plaintiffs have and recover of the succession of said Briscoe $700 with five per cent. interest thereon from January 1st, 1872, and the same sum with same interest from the first of January of each succeeding year until paid, and the further sum of ten thousand dollars and costs.

A rehearing was granted, and at the last hearing, in 1885, the personal judgment against the heirs was allowed to stand, because they had failed to plead the discharge in bankruptcy, but the widow and fraudulent assign was allowed to avail herself of the discharge, and the demand for the revendication of the property was rejected.

ARGUMENT.

The plaintiffs prosecute the writ to have this judgment reversed, and for cause of error assign.

1. That the plea of the discharge in bankruptcy was personal to the bankrupt and his representatives, and could not avail the defendant widow, fraudulent assign.

2. That the instrument on which the suit is based sets out an express, private, discretionary trust, with a remainder and

a reversion, and is excepted from the operation of the bankrupt act.

The first assignment is sustained by the opinion of this court in the case of Moyer vs. Dewey, 103 U. S. 301, in which this court decided that the effect of a discharge in bankruptcy is personal to the bankrupt, and does not avail to release others. The Supreme Court of Louisiana attempted to distinguish the cases, by saying: "The transfer of property there attacked took place prior to the bankruptcy, while that here assailed arose subsequently thereto, so far as Mrs. Briscoe is concerned.

2. Judgments had been rendered against the debtor in that case subsequently to the bankruptcy, although founded on debts existing prior to his discharge." This attempt is most unfortunate, because the doctrine so broadly, and so correctly, stated, that the effect of a discharge in bankruptcy is personal to the bankrupt, and does not avail to release others, is founded on the distinction between personal and real exceptions, which has come from the Roman law, and has been fully recognized by the Supreme Court of Louisiana. In the case of Serrac Hij. vs. Hoffman & Co., 29 Annual 17, the court decided that the assignee of a bankrupt could not intervene in a suit in which the bankrupt was sued, and set up either the latters adjudication or discharge in bankruptcy as a ground for staying proceedings, or in bar of the action, because that is a right personal to the bankrupt. In the case of same vs. same, 30 Annual 67, the court decided that the discharge in bankruptcy of the principal debtor did not release the surety, because the surety cannot oppose to the creditor exceptions which are personal to the debtor. It thus appears that the honorable court, in deciding that the plea is personal to the debtor, when the fraudulent act is prior to the bankruptcy, and avails to release others when the fraudulent act is subsequent to the bankruptcy, has not only violated the jurisprudence of this court, and its own jurisprudence, but has violated a general principle of jurisprudence which is common to both systems.

The instrument upon which the action is based sets out an express, private discretionary trust, with a remainder and a reversion, one of the strictest trusts known to the English system, and it would be a want of proper consideration for the learning of this court to argue that such a technical trust does not come within the operation of the bankrupt act.

It is sufficient to quote the words of the court in its first opinion. "It would be difficult to find a fuller creation of a trust than is here in words set out. Briscoe is to pay Ann Andrews a fixed sum annually, to produce which a larger sum is put in his hands. The payment is not to be made un-

conditionally, but only if Ann's conduct is discreet and prudent, and of that Briscoe is to be the judge. His discretion alone controls him. If Ann shall marry and have issue, the trust continues, and when she dies her issue shall be unconditional owners of the fund, and the trust terminates. If Andrews dies before his daughter, she becomes unconditional owner provided she have no issue. If she have issue, then the trust remains as before provided. If Ann die before her father without issue surviving, the money must be returned to Andrews or his heirs. The terms used in acts of Congress must be construed in the sense given them in the Common law. They are framed by common lawyers, have force and effect among and upon a people mainly governed by the common law, and are interpreted by courts that interpret and expound that system. Not a moments doubt would be entertained by them that the word "fiduciary" in the bankrupt act meant primarily and par excellence such obligation as was created by Andrews and accepted by Briscoe, and therefore the discharge of Briscoe in bankruptcy did not affect his liability for the obligation thus assumed by him. His own conception of the nature of the debt accords with this, since he entered it upon his schedule of debts as a trust."

The opinion of this court in the case of Hennequin vs. Clews, 111 U. S. 676, cited and relied on by the Louisiana court, can have no possible bearing on this case, except to remove any doubt which might exist as to the right of the plaintiffs to the writ of error, in the case in which the judgment is in favor of the defendant on the plea of bankruptcy.

A factor entrusted with the goods of his principal to be sold, and a pledgee having possession of the property pledged, are not cases of express trusts, and such was all that this court decided in that case.

Such a confusion of things so distinct could only result from a profound ignorance of the law of trusts and trust estates.

There is a question which is not presented by any plea, and not passed on by the Supreme Court of Louisiana, which, as drowning men clutch at straws, may be raised in this court. It is the settled jurisprudence of this court that the right to bring an action to recover property fraudulently conveyed before the adjudication in bankruptcy is vested in the assignee. Meyer vs. Dewey, 103 U. S. 301. There is nothing in the pledge which called for the sweeping decree, that the sales and conveyances by which Mildred Gregory received title to the Mound plantation and its appurtenances from the sheriff be annulled. The allegation of the petition is "that the sale and conveyance of the property by Mrs. Mildred Gregory to Mrs. Mary E. Briscoe was a fraudulent simulation, contrived

and intended by William J. Briscoe to defraud plaintiffs, and to defeat the execution of the trust confided to him, and that the said Mrs. Mary E. Briscoe received the title to the property for the use of the said William J. Briscoe, who paid the price or consideration expressed therefor, and continued in the possession of the property." Page 4. The prayer of the petition is "that the sale and conveyance made to Mrs. Mary E. Briscoe by Mrs. Mildred Gregory be declared simulated and fraudulent, and that the property be declared to be the property of William J. Briscoe, deceased, and subject to the payment of his debts." The whole theory of plaintiffs' case was that the conveyance was made to the wife, interposed for the husband's use, to defeat the obligation of the trust, and the court, in its last opinion, correctly found that the transfer of property here assailed was subsequent to the bankruptcy. However that may be, the pleading does not set out nor rely on the assignment nor on the rights vested by it in the assignee, nor has the court found the fact that an assignee was appointed, or passed on any such issue, and the question, if it can be raised for the first time in this court, is settled by the decision in Moyer vs. Dewey, 103 U. S. 301.

The several issues of bankruptcy, of prescription, and of prohibited substitution, were decided adversely to the defendants at the first hearing, and the property was declared to belong to the succession of William J. Briscoe, and to be liable to the plaintiffs for the satisfaction of the judgment. A rehearing was granted, and after a years deliberation the court revoked and set aside its first decree, and rejected the demand for the revendication of the property, for the sole reason that the suit against the defendant widow, as fraudulent assign, to recover property transferred subsequently to the bankruptcy, was barred by the discharge.

It is true that the court said: "This dispenses us from the necessity of reviewing our former decision on the merits of this controversy, and we content ourselves with the remark that all that was there said may be considered as not having been said," but it is fair to presume that the honorable court, after a years deliberation, would not have rested its decision solely upon the only question of federal law in the case if it had been able to reverse its findings on the other issues, and that such findings are final. If the case is still pending before the Supreme Court of Louisiana, awaiting the judgment of this court on the federal question presented by the record, and to be reheard upon the other issues if this court should reverse the judgment on the plea of bankruptcy, this court can exercise no appellate jurisdiction, because its jurisdiction by writ of error to the state courts is limited to judgments which are final, and can not be extended

to judgments in cases which are pending for rehearing. It is the law of this court that it must look into the record to see whether the decision of the federal question alone is sufficient to dispose of the case, or to require its reversal; or on the other hand, whether there exist other matters in the record actually decided by the State court which are sufficient to maintain the judgment of that court, notwithstanding the error in deciding the federal question.

Murdock vs. Memphis, 87 U. S. 590.

This court does not look into the record to see what the State court might have decided, but to see what it actually decided, and if it finds that the federal question alone is sufficient to dispose of the case, or to require its reversal, it takes jurisdiction, and its judgment is final. The State court actually decided all the other issues adversely to the defendants, and upon the rehearing did not reverse its decision upon any one of those issues.

It is respectfully submitted that the issue raised by the question of federal law is of such controlling character that its correct decision is necessary to any final judgment in the case, and that there has been no decision by the State court of any other matter or issue which is sufficient to maintain the judgment of that court without regard to the federal question, and that this court should reverse the judgment of the State court, and render such judgment here as the State court should have rendered.

WADE R. YOUNG,
Attorney for plaintiffs.

Supreme Court of the United States.

OCTOBER TERM, 1890.

ANNA M. UPSHUR and JAMES A. UPSHUR,
Plaintiffs in Error,
vs.
MARY E. BRISCOE AND OTHERS,

No. 146.

IN ERROR TO THE SUPREME COURT OF LOUISIANA.

Brief for Defendant in Error.

WM. A. MAURY,
Of Counsel, &c.

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No. 146.

IN ERROR TO THE SUPREME COURT OF LOUISIANA.

Brief for Defendant in Error.

This is, in substance, a bill in equity, filed in the Ninth District Court for the Parish of Tensas, Louisiana, to enforce against a certain plantation, situate in Tensas Parish, Louisiana, claimed and held by the defendant in error, Mary E. Briscoe, a certain alleged trust obligation of her husband, William J. Briscoe, now deceased, in the sum of $10,000, with considerable arrearages of interest. (pp. 7, 8.)

According to the case made in the petition, William J. Briscoe, on February 26, 1866, mortgaged this plantation to Given, Watts & Co., of New Orleans, to secure five promissory notes of $10,000 each. (p. 2.)

On November, 1866, Briscoe married the defendant, Mary E. Briscoe, then Mary E. Castleman. (p. 2.)

In January, 1868, Mildred Gregory, the holder of three of the mortgage notes, instituted foreclosure proceedings against Briscoe on the mortgage, and on March 7, 1868, the plantation, with the crops, and various other personal property, attached thereto was adjudicated to said Mildred Gregory for the sum of $20,000, and duly conveyed to her. (p. 2.)

After this proceeding, and on April 1, 1868, William J. Briscoe was adjudged a bankrupt "and was duly discharged December 18, 1868, as will more fully appear from the duly certified copies of the proceedings, hereto annexed for reference and marked Exhibit D." (p. 3.)

On December 12, 1868, Mildred Gregory sold the plantation, in question, with the crops, &c., &c., to the defendant Mary E. Briscoe, for $4,517.82 in cash and $25,000 in notes. (p. 3.)

About September, 1880, William J. Briscoe died, leaving him surviving a widow, Mary E. Briscoe, and certain heirs and legal representatives, who are defendants in this suit. (p. 3.)

It is claimed and charged in the petition and amended petition (pp. 4-6 and 12-14), that the adjudication of the plantation, &c., to Mildred Gregory, and the act by which she conveyed the same to Mary E. Briscoe, were a fraudulent conspiracy between them and William J. Briscoe, to cover up the latter's property from his creditors, and that the plantation, &c., were his property up to his death, and an account and decree against the defendants is prayed for. (pp. 6 and 14.)

Exceptions of Mary E. Briscoe.

The defendant, Mary E. Briscoe, filed exceptions to the petition, which are substantially, as follows:

1. That the petition discloses no cause of action;

2. That plaintiffs right of action, if it ever existed, is barred by the discharge of William J. Briscoe in bankruptcy, as alleged in the petition, which discharge is specially pleaded;

3. She pleads in bar the prescription of one, three and ten years. (p. 9.)

She also pleaded in bar the prescription of five years. (p. 14.)

Answers.

The defendant, Mary E. Briscoe, also answered the petition and amended petition (pp. 9 and 14).

In her answer she insists that plaintiffs never had any cause of action against her, but that if they had, the same had been fully discharged and barred by the discharge in bankruptcy of William J. Briscoe.

She avers that the pretended donation or trust on which the suit is based is void by the laws of Louisiana.

She denies, positively and unequivocally, the charges of fraud in the petition, and avers that the transaction, under which she claims title to the plantation, was fair and real, and states facts and circumstances in support of her denial of fraud and her allegation of good faith, which, however, need not be particularly noticed, as they have no bearing on the federal questions arising on this writ of error.

It is unnecessary to notice the answers of the other defendants, for they have no interest what-

ever in this writ of error, having submitted to the judgment against them.

Judgment.

On June 30, 1883, there was a judgment *in favor* of the defendant, Mary E. Briscoe, and *against* the heirs, in so far as assets had come to their hands, for the arrearages of interest, but not for the principal claimed, the demand for the latter being rejected as premature to the heirs of Briscoe. (p. 17.)

From this judgment there was an appeal by the plaintiffs to the Supreme Court of the State.

Judgment of Supreme Court.

On May 19, 1884, the judgment was reversed by the Supreme Court, and a judgment entered cancelling and annulling the transactions under which the defendant, Mary E. Briscoe, claimed the plantation, and declaring the plantation liable for the plaintiffs' demand, and extending the judgment against the heirs-at-law to the principal of $10,000, as well as the interest. (p. 19.)

The opinion of the court in support of this judgment is given in the record (p. 20).

Rehearing.

Applications were made for a re-hearing (pp. 28, 29), and on May 31, 1884, a re-hearing was granted (p. 29).

Judgment on Rehearing.

On March 16, 1885, the Supreme Court revoked

and set aside their decree of May 19, 1884, and amended the judgment appealed from so as to condemn the succession of Briscoe to pay the principal, as well as the interest demanded, *and affirmed the judgment appealed from*, in all other respects (pp. 30, 31), which was, of course, an affirmance of the judgment of the court of first instance in favor of Mrs. Briscoe.

The *unanimous* opinion of the Supreme Court on the rehearing, is also given in the record, (p. 31.)

The first opinion contains an elaborate argument to show fraud on the part of Briscoe and his wife, and Mildred Gregory.

The second opinion disposes of the case on the exception of the defendant Mrs. Briscoe setting up her husband's discharge in bankruptcy as a bar to the suit, but that opinion contains this remarkable paragraph, namely, "*This dispenses us with the necessity of reviewing our former decision on the merits of this controversy, and we content ourselves* with the remark THAT ALL THAT WAS THERE SAID MAY BE REGARDED AS NOT HAVING BEEN SAID." (p. 36.)

By this we understand the learned Court to mean, *that everything they had said in the former opinion imputing fraud to Mrs. Briscoe is absolutely retracted*, thus leaving the case, as to her, precisely as it stood under the judgment of the Court of first instance, which declares, that by reason of the law *and the evidence being in favor of defendant, Mrs. Mary E. Briscoe, and against the plaintiffs, it is ordered, adjudged and decreed that said Mrs. Briscoe do have judgment against plaintiffs, that plaintiffs' demand be rejected at their costs.*" (p. 17.)

So that the case presents itself on this writ of error *without any ground whatever, for calling in question the honesty and good faith of Mrs. Briscoe.*

The plaintiffs below sued out a writ of error from this Court to the said judgment entered by the Supreme Court of the State on rehearing, on March 16, 1885. (p. 30.)

Argument.

Looking at the case from the standpoint of the United States bankrupt law, the only point of view from which it can be regarded, under this writ of error, it is destitute of merit; first, because, if the plantation in question was in fact the property of William J. Briscoe, and fraudulently omitted by him from his schedule, *his assignee alone* has the right to subject it to his debts; secondly, because no suit for that purpose is "*maintainable*" unless brought "within two years from the time the cause of action accrued for or against such assignee; and thirdly, because the demand on which this suit is founded was extinguished by the discharge in bankruptcy of the said William J. Briscoe.

The Discharge in Bankruptcy.

In considering the validity of the exception of Briscoe's discharge in bankruptcy, it is necessary to look at the character of the claim to which the exception refers.

It grows out of the following act :

STATE OF LOUISIANA, }
Parish of Tensas. }

Know all men by these presents that I, James Andrews, of said parish and State, do nominate, constitute, and appoint William J. Briscoe, also of said parish and State, my true and lawful attorney for me and in my name to pay or cause to be paid to Annie M. Andrews the sum of seven hundred dollars ($700) annually, said amount to be paid at the counting-house of some commission merchant or at some banking house in the city of New Orleans in equal quarterly instalments of one hundred and seventy dollars each, said commission or banking house to be named and specified before the day of payment to the said W. J. Briscoe to the said Annie M. Andrews. The said payments are to be made commencing with the date of this instrument and continuing during the natural life of the said Annie M. Andrews, subject to the conditions and restrictions hereinafter enumerated, viz: The payments are to be regularly made as above set forth according to the discretion of the said William J. Briscoe of the general good conduct of the said Annie M. Andrews, which conduct must in all respects comport with the character and bearing of a discreet, prudent female.

The said William J. Briscoe, being here present, accepts this appointment and trust and binds himself to carry out the provisions of the same according to its true intent and meaning; and I do further constitute and appoint the said William J. Briscoe my attorney infact to have and receive the sum of ten thousand dollars ($10,000), to be held by him for the benefit of the said Annie M. Andrews, subject to the conditions hereinafter enumerated, viz: It is understood that the annual payment of seven hundred dollars as above secured shall be considered as interest upon said amount of ten thousand dollars; and, first, it is provided that in case the said Annie M. Andrews shall hereafter marry and leave issue this amount of ten thousand dollars shall remain invested as heretofore in the hands of said William J. Briscoe, and the interest shall continue to be paid as heretofore mentioned, and in case of the death of the said Annie M. Andrews such children, legal issue of her, shall become possessed of the above amount of ten thousand dollars unconditionally in full possession, to be paid by the said William J. Briscoe.

Second. It is provided that in case of my death occurring before that of the said Annie the above amount of ten thousand dollars shall be placed unconditionally in her hands by the said William J. Briscoe, provided only she shall have no legal issue. In case, however, she shall at the time of my death have any child or children, legal issue of her body, that the provisions heretofore enumerated shall be strictly adhered to.

And, third. It is provided that in case of the death of the said Annie M. Andrews without legal issue of her body surviving, then the above sum of ten thousand dollars shall revert to me, my heirs or assigns.

Thus done and signed, at St. Joseph, in said parish and State, this 25th day of January, A. D. 1857, in presence of Geo. W. Williams and Edgar D. Farrer, competent witnesses.

JAMES ANDREWS.

G. W. WILLIAMS,
E. D. FARRAR.

To this act or instrument, William J. Briscoe became a party "and binds himself faithfully to carry the same into effect," "and binds himself as surety for the said James Andrews that the within mandate and all the stipulations therein contained shall be well and faithfully executed, and that the same shall be complied with in all its clauses. The said Annie M. Andrews also became a party to the instrument, and formally accepted the same and bound herself "to ratify and abide by the above mandate in all its provisions." (p. 8.)

Section 5119 Revised Statutes declares that a discharge in bankruptcy "shall, subject to the limitations imposed by the two preceding Sections, release the bankrupt from all debts, claims, liabilities and demands which were or might have been proved against his estate in bankruptcy." * * * * * *

As Section 5118, one of the sections referred to in Section 5119, provides only that a bankrupt's discharge shall not release any party jointly bound with him, it is clear that the claim in question against the bankrupt, Briscoe, is discharged, unless it falls within the meaning of section 5117, which is the other section referred to in Section 5119, and is as follows:

> No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy; but the debt may be proved, and the dividend thereon shall be a payment on account of such debt.

As we are not dealing with *names* but *things*, it is necessary to inquire what the act or instrument, to which the bankrupt Briscoe became a party, is *in its legal effect*, for it must operate in that way and no other.

The fundamental purpose of the instrument was to establish the relation of debtor and creditor between Briscoe and the beneficiaries of the instrument. That is the basis of the transaction.

What other sense can we give the following words of the instrument: "It is understood that the annual payment of seven hundred dollars as above secured shall be considered *as interest* upon said amount of ten thousand dollars; and, first, it is provided that in case the said Annie M. Andrews shall hereafter marry and leave issue this amount of ten thousand dollars *shall remain invested as heretofore in the hands* of William J. Briscoe, and *the interest* shall continue to be paid as heretofore mentioned," &c.

Here we have all the essentials of a loan, a *mutuum*, the effect of which was to make Briscoe *owner of the ten thousand dollars in his own right*, as must be the case whenever there is a loan of fungibles, whether money, wheat, oil, or wine.

The ten thousand dollars were "*invested*" in Briscoe's hands, and he was, like any other debtor, authorized to use the same *in any way he thought proper*. This follows from its being made an *investment and from the obligation to pay interest*, for we cannot suppose that Briscoe meant to stipulate to pay interest on a fund which was to remain dead and unproductive in his hands.

But this right of Briscoe's to use the ten thousand dollars in his own business, in any reckless adventure he saw fit, is repugnant to the idea of a fiduciary relation to the fund, for it is the primary duty of a trustee to keep the trust fund ear-marked and separate from his own money. The commingling of the two is a conversion of the trust fund and makes the

trustee *debitor ex delicto*. Such a confusion of property is a conversion, because it subjects the trust money to the peril of the trustee's insolvency, it places the *cestui que trust* on a footing with the trustee's general creditors, and it creates a conflict between the trustee's interest and his duty to exercise vigilance towards the trust, which seriously menaces the safety of the trust money.

To say that Briscoe was a trustee, a fiduciary, is to say that he held that relation towards a fund which he might have staked on the hazard of a die, without violating any duty imposed on him by the instrument which he had assumed to carry into effect. To call Briscoe's duty under that instrument fiduciary is to confound things essentially distinct.

This is the view of the instrument that was taken by the Supreme Court of Louisiana. (p. 34.)

A bailee, an agent or mandatory, who is unfaithful, is guilty of violating a trust which has been reposed in him, for which an action will lie at common law, but of a technical trust or fiduciary relation Equity has *exclusive* jurisdiction. The common law ignores any such relation, and, consequently, a trustee invested with the legal title to a thing is the absolute owner of that thing at common law. It is in Equity *alone* that the trust impressed on that legal title is recognized and enforceable.

It is true the instrument says that Briscoe "accepts this appointment and *trust*," but it can hardly be successfully contended that the word "trust," as thus used, is to be taken in its technical sense—which would be abhorent to the rest of the paper—any more

than that the presence of that word, in an ordinary power of attorney, or contract of bailment, or partnership, would bring it within the exclusive jurisdiction of equity.

The words trustee or fiduciary, having this well-defined sense in jurisprudence, it is but proper that when either of them appears in the bankrupt law it should be taken in that sense, unless there is a plain indication to the contrary.

When, therefore, the bankrupt law excepts from the operation of the bankrupt's discharge debts created while the bankrupt was acting "in any fiduciary character," it would be an unreasonable restriction of the beneficial purpose of that law to hold that it meant to except all debts created under circumstances in which a trust or confidence was reposed in the bankrupt, in the general popular sense of those terms, for, as this Court said, in *Chapman* vs. *Forsyth*, (2 How., 202), such a construction would make it difficult to give the act the reasonable operation its framers intended, since it would exclude from the protection of the discharge almost all debts—the Court saying that, "in almost all the commercial transactions of the country, confidence is reposed in the punctuality and integrity of the debtor, and a violation of these is, in a commercial sense, a disregard of a trust."

It is true that case arose under the bankrupt act of 1841, but it can hardly be supposed that Congress, with that case before it, could have intended to use the term "fiduciary character" in the bankrupt act of 1867 in a popular sense, in the absence of words plainly indicating such a purpose. And it is fair to

presume that the construction put upon the words "fiduciary capacity," used in the act of 1841, accounts for the use of the words "in any fiduciary character" in the act of 1867, without the enumeration contained in the act of 1841, of some of the fiduciary relations covered by those words.

The case of *Chapman* vs. *Forsyth* has been followed by this Court in construing the bankrupt act of 1867.

Hennequin vs. *Clews*, 111 U. S., 676;
Palmer vs. *Hussey*, 119 U. S., 96;
Wolf vs. *Stix*, 99 U. S., 1;
Neal vs. *Clark*, 95 U. S., 704.

In *Hennequin* vs. *Clews*, it was held that the liability of bankers, to make good collaterals converted while in their hands as security, was not a debt created either by "fraud" or "in any fiduciary character." The language of the Court is particularly applicable to the case at bar. "The creditor who holds a collateral *holds it for his own benefit under contract*. He is in *no sense a trustee*. His contract binds him to return it when its purpose as security is fulfilled; but if he fails to do so, it is only a breach of contract, and not a breach of trust." And so we say here: Briscoe held the $10,000 "*for his own benefit under contract*" as a loan, and his failure to return it or to pay the interest on it *is only* "*a breach of contract, and not a breach of trust.*"

What the distinction is between the failure of the bankers to return the collateral after the debt secured by it was paid, and the failure of Briscoe to pay the interest, is not perceived. How any special provi-

sions in a contract of loan as to the way in which the interest or the principal is to be paid can work a transformation of the contract is not perceived, either.

In *Cronan* vs. *Cotting* (104 Mass., 245), the plaintiff delivered to the defendant certain accepted bills of exchange, with directions to collect them and apply the proceeds to certain debts owing by the plaintiff to the defendant as administratrix of her husband. The action was brought to recover the balance of such proceeds remaining in defendant's hands after payment of the debts. The defendant pleaded her discharge in bankruptcy, and the question was whether the defendant's liability was a debt contracted, "while she was acting in a fiduciary character," and the court held that it was not, and so was covered by her discharge.

The following observations of the court are directly applicable to this case:

> The debt, in this case, arose exclusively out of a single transaction between the parties. Its creation involved no element other than that of contract. The existence of the liability did not spring from any breach of trust. The only default consisted in the non payment of the balance due the plaintiff, after satisfying the purpose of the pledge. The debt did not result from, but preceded, that default.

So, in the case at bar, the debt of Briscoe *preceded* his default, and was not created by his failure to carry out the instructions of the mandate. The case of *Phillips* vs. *Russell* (42 Maine, 350), is to the same effect.

It is, furthermore, to be observed that the language of the bankrupt act, in this particular, is such as not to apply to the liability of Briscoe, even though he was a trustee under the instrument in question. It

excepts from the bankrupt's discharge debts created "*while acting* in any fiduciary character,"—thus, apparently, applying only to debts contracted by one who was already a fiduciary when the debt was contracted. This view is suggested in the case of *Cronan* vs. *Colling* (*supra*), the language of the court being:

> We are inclined to the opinion that the phrase implies a fiduciary relation existing previously to, or independently of, the particular transaction from which the debt arises. The collocation tends to favor this interpretation. If the phrase "while acting," &c., be referred to that which immediately precedes, it implies something in the nature of defalcation. If it be referred to the first branch of the provision, its association with fraud and embezzlement carries the implication of a debt growing out of some fraudulent misappropriation, or, at least, breach of trust.

This suggestion of the Supreme Court of Massachusetts, seems well founded, because it is not perceived that there was any good reason why the exception from the discharge should apply to any fiduciary debts but those arising *ex maleficio*—a debt arising from, or accompanying, the constitution of the relation of fiduciary, needed no attention, because trust money ear marked and kept separate from the bankrupt trustee's own money, could not fall under the administration of the bankrupt court, for it forms no part of his assets. It is only when a fiduciary has been guilty of a *conversion* of trust money that his *cestui que trust* has to go into the bankrupt court, along with other creditors, and as a merely general creditor. In other words, it is only when the trustee has, by his breach of trust, made his duty to account for the trust money his own absolute debt, that he can be said to create a debt while acting in a fiduciary character. His accountability for trust money, properly administered by him, is not a debt in the legal sense of that term, because it is a sufficient

answer to a demand for the trust money for him to show that it has been lost by no default of his, which would be no defence, clearly, in the case of a debt proper.

Could defendant, Mary E. Briscoe Plead her Husband's Discharge ?

If the position taken on the other side, that nobody but the bankrupt himself, or his heirs or representatives, can plead his discharge, we have this absurd result, that property acquired by a bankrupt after his discharge and transferred by him as a gift to another, may be subjected to debts protected by his discharge, unless the bankrupt himself sees fit to plead his discharge. Which means that there is no protection for the donee in such a case—for the bankrupt's plea being *personal to himself*, according to this theory, can only operate for his own protection and not that of his donee.

The statement of such a proposition is its own refutation, for nothing could be more clearly against natural justice.

In *Botts* vs. *Patton*, (10 B. Monroe, 455), which was a case where *both* the bankrupt and his fraudulent assignee pleaded the former's discharge, the court seems to lay down the general proposition that a bankrupt's grantee can protect himself under the bankrupt's discharge against proceedings instituted for the purpose of subjecting the property granted to debts covered by the discharge. The court says:

As the debtor was a discharged bankrupt, and no longer liable for the judgments at law, the creditors could not subject any of his assets to the payment of his debts. If he be not liable for the debts, McCorkle, the grantee, cannot be required to pay them by the creditors

out of the estate in his hands, for that can be reached alone to satisfy Patton's debts. As, therefore, the latter is discharged from the debts, and no longer liable for them, *the creditors cannot proceed against his fraudulent transferee to obtain payment from him.*

It is argued, however, that the bankrupt's certificate of discharge cannot have the effect here given to it, because of the fraud committed in this transaction. By the express provisions of the act of Congress, the discharge of the bankrupt is to have the effect of releasing him from all his debts, unless the same shall be impeached for some fraud or willful concealment by him of his property, or rights of property, contrary to the provisions of that act. To avoid, therefore, the effect of a certificate of discharge, when plead and relied upon, as in this case, it must be impeached for fraud in obtaining it, and the grounds of its impeachment properly specified and alleged, which was not done.

The case of *Moyer* vs. *Dewey* (103 U. S., 301), relied on by the other side, does not antagonize the view here contended for. In that case the bankrupt had confessed judgments since his discharge for debts covered by his discharge, and the suit was to subject to those judgments, property in the hands of fraudulent grantees of the bankrupt. The bankrupt did not answer, and so waived his discharge, and the court says: "*Under these circumstances*, we concur in the opinion of the Court of Appeals, that so far as the discharge itself is concerned, its only effect is personal to him, and does not avail to release the defendants in this suit from liability for the fraud committed by them." (pp. 302-3.)

Clearly, "*under these circumstances*," the discharge could not have availed the bankrupt himself, if he had pleaded it, and, therefore, could not avail his fraudulent grantees. We see no reason for saying that that case is relevant to the case at bar.

The Right to Bring such a Suit as this is Vested in Briscoe's Assignee in Bankruptcy alone.

This point is included, necessarily, in Mrs. Briscoe's first exception that the plaintiff's have no cause of action (p. 9).

Mrs. Briscoe's defence, in this particular, under the bankrupt law, ought to be available to her under this writ of error,—certainly to the extent of having the question settled, so as to prevent the necessity of another writ of error, if the decision of the Court on the first point should be against her. This would seem to be in accordance with the practice of this Court.

That the property adjudicated to Mrs. Gregory on January 14, 1868, before the bankruptcy proceedings were instituted (p. 4), for the purpose, as it is claimed, of shielding the property as Briscoe's, should have been embraced in Briscoe's schedule of assets, would not seem to admit of doubt, if the facts be as the plaintiffs claim.

This being so, it follows that all Briscoe's right and title to the property passed to his assignee in bankruptcy, who, *alone*, is entitled to sue for it. This has been repeatedly held by this Court.

Glenny vs. *Langdon*, 98 U. S., 20;
Trimball vs. *Woodhead*, 102 U. S., 647;
Meyer vs. *Dewey*, 103 U. S., 302.

It is set up that there is nothing in the record to show that an assignee was appointed in the bankruptcy proceedings. But this comes with bad grace from the plaintiffs in error who, after filing with their petition "duly certified copies" of the bankrupt proceedings, "*hereto annexed for reference* and marked Exhibit D," have failed to put them in the transcript sent up as a return to this writ of error.

That this transcript is not a correct copy of the record, clearly appears from the statements contained

in the petition, on which the writ of error was allowed. (p. 39.)

But there seems to be enough in the plaintiffs' petition to enable the court to deal with the question.

The Suit is Barred by the Bankrupt Act.

What is said about the availability of the next preceding defense under the bankrupt act, under this writ of error, applies with equal force to this point.

The assignee in bankruptcy having failed to sue within two years, the plaintiffs have no right to sue.

Trimball vs. *Woodhead*, 102 U. S., 647;
Meyer vs. *Dewey*, 103 U. S., 302.

The bankrupt act (§ 5057, R. S.), provides that no suit shall be "*maintainable*" by the assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee.

This defense needed not to be pleaded; because it appears, by the plaintiffs' petition, and by the date of the filing of the petition, that some thirteen years had elapsed between the vesting of the assignee's title and the bringing of this suit.

These facts thus appearing, it was not necessary to plead the limitation of two years, the first exception of Mrs. Briscoe being sufficient to raise the point, and holding the same relation to the petition as a demurrer.

It was held, under a similar provision in the bankrupt act of 1841, that, if it papeared in the declara-

tion that the suit had not been brought within two years, the objection might be raised on demurrer.

Harris, Assignee, vs. *Collins*, 13 Ala., 388.

There is an analagous practice in this court, under section 1008 R. S., prescribing the time within which writs of error and appeals may be brought.

It is submitted, therefore, that the record does not seem to call for a reversal of the judgment.

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